



P H
Applicant

and

THE COMMONWEALTH SECRETARIAT
Respondent

Before the Tribunal constituted by
Mr Christopher Jeans QC, President; Justice R N Ukeje, OFR, member and Mr Chelva Rajah SC, member

JUDGMENT

Introduction

1. The Applicant P H is a dual national: British and Australian.
2. He came from Australia to work for the Respondent in London.
3. The dispute is about the allowances he claims in connection with relocation to London and return to Australia. As a dual national he was denied the special benefits applicable to an “overseas recruited staff member” (“ORSM”). He argues that his exclusion from such benefits was unlawfully discriminatory. In the alternative he argues that he is entitled, as a matter of construction of his contract or estoppel or on principles of good faith and related duties to be entitled to “repatriation” benefits which the Respondent was not prepared to pay.
4. We will first set out the principal facts. Then we will deal in turn with
 - (a) his claim that the restriction of the benefit relocation package to “overseas recruited staff members” was discriminatory
 - (b) his claim to be entitled to repatriation benefits under the terms of his contract or under the general principles on which he relies.

The principal facts

5. The Applicant was born in England in 1971. His mother was English, his father Australian. He became a naturalised Australian citizen on 11th April 1974 and has since had dual nationality. In early 1975 his family moved to Australia. He was educated in Australia, where he became a lawyer. He brought up a family there.
6. In December 2009 he applied for temporary employment with the Respondent in London as “Temporary Legal Adviser Maritime Boundaries”. The job was in the Economic and Legal Section of the Special Advisory Services Division. He was appointed and began work on 1st March 2010.
7. On 12th March 2010 he was interviewed for the substantive post of “Legal Adviser Maritime Boundaries”. The interview was successful.
8. It appears that the Applicant’s family remained in Australia when he started the temporary post. He was concerned to establish what relocation allowances (we use the expression broadly at this stage) he would receive in the event of taking up the offer of the substantive post. He had discussions on the subject with Marilyn Benjamin of the Respondent’s Human Resources Division. These discussions led to an important e-mail exchange. We set out fully the relevant sections of the exchanges:

18th March: Applicant to Ms. B

“Hi M

I just wanted to confirm that I had properly understood where we got to in our discussion earlier today.

My understanding is that you have spoken to the Head of HR and she has asked that you draft a paper for consideration by the DSG to consider my situation. In the meantime, you expect that the

Secretariat will be able to offer me airfares for me and my family, the standard relocation allowance and 2 weeks subsistence allowance after we all arrive in London.

This position is consistent with another Secretariat officer, albeit one who has ties to the UK, including their own accommodation. (In this regard, you have noted that my position is different in that neither my wife nor I have any 'roots' to the UK, although I was born here and lived here as a very young child.) On that basis I note that I had intended to apply as an Australian.

The availability or otherwise of the accommodation allowance, education/child care allowance, and other entitlements as referred to in the level 'G' condition (installation grant, home leave) remain subject to consideration by the DSG (including potentially other parts of the Secretariat - for example legal consideration of the relevant definitions). I understand that this consideration process is out of your control. However, you have been good enough to provide a rough estimate of around 1 month for the Secretariat to form a view on the questions I have raised (recognising that you cannot be sure of this timeframe).

Could I please ask that you confirm whether this is an accurate statement of the position, or else let me know if there is anything I have misunderstood?

Thanks for your ongoing assistance with this matter - it helps me in making relevant arrangements with my family in Australia."

The reference to "G condition" is a reference to certain special relocation benefits conferred on ORSMs, with which we deal below. Mr H is acknowledging that ORSM benefits are not currently being offered to him. He is also recording that he has put in a special plea for such conditions to be offered in his case and that the Respondent would be considering this. .

Ms. B replied (within the hour) as follows:

"Dear P

Thanks for your message.

I confirm that I did speak with the Head of HR late yesterday afternoon and she advised me to refer the issue of determining what terms you should be recruited on given the fact that you have dual nationality i.e. Australian and British Citizenships to the Deputy Secretary-General.

In my conversation with you, I informed you that we have had a similar case where we recruited someone else with dual nationality from overseas but as the person had British citizenship she was given a one-off entitlement of Installation Grant, Subsistence Allowance for two weeks, and Shipping of their personal effects to London. I said that at most, that is what we in HR would expect to offer you.

Please refer to the handbook which clearly sets out the definition of an overseas recruited staff member (i.e. staff who are entitled to benefits).

(b) "Overseas Recruited Staff Member" means a staff member between Grades CS5 and CS6 whose stay in the UK is contingent upon the staff member's employment with the Secretariat. Should such a staff member acquire or have, while employed in the Secretariat, been entitled to British nationality or residential status in the UK the staff member will cease, from the date of acquisition or entitlement, to be an overseas recruited staff member.

Commonwealth Secretariat: Human Resource Handbook Section G: Issues relating to diplomatic and overseas staff 137 28/05/02.

The Deputy Secretary-General with responsibility for HR is travelling at the moment. My memo on the subject will be sent to her office by the end of the day. As I explained, we would need to allow enough time to enable the necessary legal interpretation and advice to be obtained. I have suggested that this could take up to a month. Of course, it could take a little less time or a little longer. My advice was for you to work on the basis of what HR knows you could be entitled to according to the handbook which is what I have outlined above. This is even more important as there is no distinction as to whether the person has lived or has ties in the UK.

I will revert to you as soon as I have a response to my memo to the DSG.

Kind regards,

M".

[Emphasis added]

9. It appears that a draft contract/offer letter was then sent to Mr H. We do not have in our papers a document which has been separately identified as the draft which was sent. It may or may not be identical to the offer dated 22nd April from the Respondent which he in fact signed in June 2010. From the e-mail dated 23rd April 2010 which we set out below it would appear to have been in line, as regards relocation, with both Ms. B's e-mail of 18th March 2010 and with the offer which Mr H was later to sign. We again set out the relevant parts of the e-mail in full.

"Dear Ms B

I refer to the draft contract received by email below from Ms V on behalf of Ms O.

The contract appears to be generally acceptable, but there are several points that I would like to raise before agreeing to terms.

Firstly, I note the Secretariat's position that I am a UK recruit but that it is offering me relocation and travel costs, the installation grant and subsistence allowance on arrival. I would appreciate it if you could provide me with the extracts from the relevant manual or other Secretariat document that sets out the full terms associated with those entitlements so that I understand the full scope of the contractual offer. If there is no information in the manual about those entitlements other than what is set out in the draft contract then please advise that this is the case so that I understand that the draft contract sets out fully the terms related to the entitlements.

Secondly, in relation to the subsistence allowance, the draft contract description of this allowance is different to the description in the attachment to the draft contract. Please advise which is the accurate representation of the terms for the subsistence allowance. ...

The final point that I would like to raise is further to discussions that we have had about the other allowances. Please advise whether any progress can be reported on the issues that HRS has taken up within the Secretariat about the application of the overseas recruited staff conditions to people in my circumstances.

If there is no progress to report I would like to formally request, as part of the negotiation process for my contract, that the Secretariat pay the accommodation allowance under my contract or an agreed portion of that allowance. It is clear that discretion exists to offer overseas recruited staff conditions to non-overseas recruited staff, and any assistance with rent will enable us to better place our daughter in suitable schooling. As you will be aware, schools throughout the Greater London are heavily oversubscribed and the only control parents have over the placement of their children is to live close to a school. However, rental prices are higher close to schools. I am not proposing to attempt placement of our daughter in a top school, but we need to ensure that she is placed at a school that will meet her needs, particularly in the context of being new to the country. As I said, any assistance on this point would be welcomed. While I acknowledge that the Secretariat has an interest in managing its costs and treating staff equally I have not identified any staff member who is in my position and, accordingly, suggest that a case for different treatment could be made without setting a precedent. I do not seek any of the other benefits associated with overseas recruited staff positions for this negotiation.

Regards

P".

[Emphasis added]

10. It is clear that Mr H is at this stage asking to be treated as a special case.

11. The offer letter dated 22nd April which Mr H was ultimately to sign provided as follows:

"Dear Mr H

With reference to the interview held in London on 12 March 2010, I am writing to inform you that the Secretary-General is pleased to confirm your appointment as Legal Adviser (Maritime Boundaries), Special Advisory Services Division, subject to satisfactory references, medical and security clearances.

Please note that this contract is for a period of three years in the first instance, which may be renewed subject to mutual agreement according to the exigencies of the service and subject to fully satisfactory performance.

This contract incorporates the Commonwealth Secretariat Staff Regulations and Staff Rules as laid down and amended from time to time by member Governments and/or by the Commonwealth Secretary-General.

The pay point for this position is Pay Point G and, as a UK recruit, your salary will be £50,210 (Pounds Sterling Fifty Thousand Two Hundred and Ten) per annum gross subject to deductions of National Insurance and Commonwealth Secretariat internal income tax paid at UK income tax rates. Your salary will be paid monthly including your appropriate entitlements.

I enclose the following:

1. Job and Task Description (Annex 1).
2. The summary of terms and conditions for your appointment (Annex II). You will be recruited under the terms and conditions as stated in Section A and B. The following one-off entitlements will be given to you in recognition of the fact that you are relocating from Australia.
 - Installation grant - an installation grant will be paid to you upon commencement.
 - Subsistence Allowance - you will receive subsistence for a period of up to two weeks from the date of arrival in post upon commencement.
 - Transporting effects - the Secretariat will assist you in transporting your personal effects from Canberra to the UK.

The summary of terms and conditions enclosed gives a brief outline of terms and conditions of this contract..."

[Emphasis added]

12. Pausing there, the letter reflects Ms B's e-mail correspondence with Mr H in limiting the offer in relation to relocation to the three "bullet point" items. It is also notable that there is no reference to any form of allowance or expense being paid in respect of return to Australia and transportation costs are specifically stated to relate to transporting effects "from Canberra to the UK" (and not vice versa).

13. Annex II to the letter comprised a summary of terms and conditions for Pay Point G. These comprised three sections: section A "General" terms; Section B "Appointment of British Citizens and UK Residents; and Section C Appointment of Overseas Recruited Staff".

14. Since Mr H was a British Citizen (albeit also an Australian citizen) it was "B" which applied to Mr H. As Ms B had explained and as Mr H explicitly understood, he was being treated as a British citizen (and therefore was subject to "B") and not an ORSM (who would have been subject to C).

15. Tantalizingly for Mr H, however, because the attachment was in standard form the ORSM relocation benefits (on which he would be missing out) were set out in full. It is convenient to summarise them as set out in Annex II to the offer letter.

- (i) installation and termination grant, payable on commencement and termination of employment amounting to 7% of net salary
- (ii) an accommodation allowance of 30% of gross salary
- (iii) travel costs (in business class where the flight time is more than 8 hours) on both commencement and termination
- (iv) home leave
- (v) education allowance
- (vi) payment of costs of transportation of effects by sea at commencement and termination
- (vii) subsistence allowance on first joining and subsequently the cost of furnished accommodation

The full detail of entitlements of ORSMs (and the definition quoted in Ms B's e-mail) are to be found in Section G of the Staff Rules. The installation grant payable to ORSMs is stated at paragraph 72 of the Staff Rules as being 6% for single people and 9% for married people (not the 7% figure given in Annex II to the offer letter). The Respondent states that from 2004 a uniform rate of 7% was introduced in place of the 6% for single people and the 9% for married people but it appears that the Staff Rule was not updated. The offer letter is silent as to the level of installation grant which would be paid to Mr H, who was not in any event an ORSM. It appears that it was in fact paid to him at the rate of 7% of net salary.

16. Ms. B e-mailed Mr H on 26th April, 2010 in relation to a number of matters he had raised and specifically in relation to relocation:

“... I am afraid that there is no manual or Secretariat document that sets out any term associated with the offer of relocation, travel cost, installation grant and subsistence allowance on arrival. This is simply a gesture on the part of the Secretariat that has been offered to other UK nationals who have been based overseas for a considerable length of time to assist them settle in.

The full TACOS document for the relevant pay point was sent to you. However, you will note that your contract states that you will be recruited under the terms and conditions as stated in Section A and B. If you travel with your wife and child at the same time, they too will receive the subsistence at 75% and 50% respectively. ...

I regret to say that we have only had a holding response. As I explained to you, this is outside the Secretariat's policy and has wider implications for the organisation as a whole. I do not therefore, envisage a comprehensive response soon.

Contracts at the Secretariat are non-negotiable. There is no record in HR of the discretion which you mentioned with the exception of what you are being offered as detailed in your contract and as mentioned above. No UK national in the Secretariat receives accommodation allowance. The Foreign and Commonwealth Office (FCO) had advised and recently confirmed that, in order for internationally recruited staff whose stay in the UK is not contingent on their employment with the Secretariat to qualify as overseas recruited under FCO rules, they will have to renounce their leave to remain in the UK or their citizenship. To date, I know of no member of staff who falls in this category that has taken this step.

As you know, HR has already sent a paper that is with Management for consideration on this subject. I regret that we cannot, therefore, put forward a request that forms part of what has already been submitted. ...”

17. Mr H responded on 27th April 2010 on the relocation allowances: he said as follows:

“Dear Ms B

Thank you for your prompt reply.

I note your statement that there is no document that further explains the terms of the entitlements offered to me in the draft contract. Accordingly, the documents provided to me with the contract set out the total terms relevant to those entitlements. This is acceptable but I wanted to check.

In relation to the gesture (ie the exercise of a ‘discretion’) to pay subsistence allowance, I seek confirmation that this includes accommodation assistance for the subsistence allowance period (2 weeks) plus provision of accommodation for such further period in accordance with the ‘subsistence allowance’ provision in part C of the ‘Summary of Terms and Conditions for Pay Point G’. In this regard, it would be useful to know how this assistance coordinates with the arrival of relocated personal effects. I will not have an idea of this until I hear from the removals companies (which I expect soon), but you may be able to give me an idea. Obviously there is no point moving into a house until our furniture etc arrives and I assume that the Secretariat will cover accommodation expenses for that period. ...

Thank you also for your update in respect of the allowances, I note that the test which is applied is that of an ‘overseas recruited staff member’. The definition includes British nationals and also person entitled to British nationality or residency status. I hold a UK passport. However, there are many Secretariat staff who meet the definition of being entitled to British nationality or residency status, for example by virtue of their connections to the UK based on their long service at the Secretariat. On the Secretariat's test, these people are also not overseas recruited staff members but presumably continue to receive the relevant entitlements despite having been in the UK for many years. Accordingly, there appears to be a somewhat arbitrary application of the rules where a long time resident of London receives allowances whereas a person in my position who is completely new to the country does not.

In the circumstances of our move to London money is an issue (my wife will not easily be able to work - which is different to most UK residents) and the budget looks very tight. The absence of the allowances significantly affects my ability to settle into the new role. However, we will make the best we can and hope for a favourable outcome from the review or the sensible exercise of a discretion in our

favour, recalling that my family appears to be in a rather unique position in the Commonwealth's experience and need not set a broad precedent.

Subject to the clarification of the matters specifically requested above, the resolution of logistical issues associated with the move, and a final check of the contract when it arrives, the contract is acceptable."

18. Ms B responded on 28th April 2010:

"I can confirm that the subsistence allowance is to cover accommodation and incidentals and is payable in full if the staff member stays at an approved short-term accommodation. The Secretariat will deduct the accommodation portion of the subsistence and make the payment direct to the short-term accommodation service provider, provided we have arranged such the accommodation for them.

As I informed you in my last email message, you are being recruited under the terms and conditions as stated in Section A and B of the TACOS. For information, subsistence is only paid for the first two weeks to overseas-recruited staff. The cost of the other three weeks accommodation, should they require it, is paid for them in lieu of their accommodation allowance. Therefore, if the Secretariat pays for their temporary accommodation, their entitlement to accommodation allowance will not begin until after that period. I am, therefore, afraid that this cannot be extended to you. However, the divisions are flexible is [sic] allow new starters time off during the first two weeks to enable them secure accommodation. ...

I am not sure of the source of your information but, as far as I know, working in the Secretariat for a number of years does not automatically entitle you to residency status as this is a diplomatic organisation. The criteria is set out by the UK Government and if a member of staff on overseas terms were to obtain residency status or British nationality they would no longer be entitled to allowances."

19. Mr H's employment under the contract was to start on 31st May 2010. It appears from his statement to the Tribunal that he set up here in temporary accommodation with his family on 27th May 2010 and that he heeded what he describes as the "advice" he had received that only two weeks subsistence would be payable under the contract.

20. He signed his contract on 2nd June 2010.

21. On 14th June 2010 he met with ASG Cutts. At that meeting he raised his plea for special treatment in relation to relocation allowances. He says that ASG C was

"generally sympathetic to the situation and indicated that the matter was under consideration, consistent with the statements of HRS"

We take this to be a reference to the message clearly defined by Ms B that policies were under review but that for the time being the allowances he would receive were the limited allowances explained by her and which were in due course reflected in the offer letter which he signed.

22. No change had occurred by 23rd February 2011 when the Commonwealth Secretariat Staff Association ("CSSA") wrote to Mr C expressing support for "equalisation of housing allowances paid to overseas recruited and locally recruited" diplomatic and professional staff. The CSSA noted that the ASG may be considering appointing a consultant to look at the situation and requested a widening of the consultant's study to include administration staff.

23. It appears that around the time Mr H began to consider the question of expenses connected with his intended return at the end of his contract. On 4th March 2011 he e-mailed Ms. A M, HR Section, in the following terms:

"Hi A

I was looking over my contract the other day and a question occurred to me about the installation grant and other amounts associated with my move from Canberra to London. Essentially, I am wondering what happens when we eventually go home. I assume that the benefits payable for my arrival would also be payable when we leave in accordance with the applicable provisions of the Staff Rules (ie if relocation is paid inwards it will be paid outwards), but thought it was better to get this clarified now rather than in however many years time.

I did think that I had already had this confirmed, but can't now find the relevant email - or perhaps someone (probably Edith or Marilyn) just told me."

24. Ms (A)M replied on 29th March as follows:

“Dear P,

I have now reviewed all the documentation relating to your existing contract of employment. It is noted that attached to your contract, were the TACOS applicable to your category of employment, and also this was further clarified to you vide the email sent to you on 26 April 2010 (a copy of which is attached for ease of reference). These are the contractual provisions relevant to your employment with the Secretariat in accordance with the TACOS that you signed up for, and which form an integral part of your contract. The contract does not include expatriation which, it could not, as that sits outside of your contract of employment. I note that your contract of employment was treated exactly the same as all other contracts for staff in your category of employment, to whom the same TACOS have been applied.

Kind regards
Anne”

[Emphasis added].

25. Mr Hibberd responded the same day:

“Dear Anne

This is a surprising result. I confess that I thought this would be no more than a clarification - and that the organisation of course would confirm my contractual right to repatriation. I really just wanted it formally cleared up as soon as possible.

I now request immediate review of this decision. This is extremely stressful to me. How am I to tell my wife that we have no coverage to get home? My hand shakes as I try to type this because of the implications. I comprehensively fail to understand how an organisation could contract to relocate me and my family from Australia and not at the same time relocate us home.

My contract includes an attachment that referred explicitly to repatriation and the contract cover letter itself referred to relocation, installation grant and subsistence allowances. I was told that I would receive these allowances. The problem appears to arise from the single word in the contract that means that it only covers those expenses for the move from Australia.

In all honesty I had no idea that the contract could be so limited and at no time was I expressly informed that it would be so limited. Further, as mentioned, I was led to believe in conversations with HR (I thought by email but cannot find a record now) that repatriation would be covered as an automatic incident of the inclusion of expatriation. The April email attached to your last message does not deal with this point.

At a minimum, surely I should have been clearly informed that I would not be given assistance home, given the financial implications of this position. I have no hesitation in stating that we simply would not have been able to justify the move to the UK if the package did not cover our costs home.

It did not, until very recently, occur to me that that restrictive reading of the contract on subsistence allowance might also affect my entitlement to repatriation allowance. This was based on me reviewing my contract and reconsidering the implications of the decision notified to me when joining the Secretariat that, despite being given the subsistence allowance, I would not be given the additional 3 weeks accommodation assistance referred to under the subsistence allowance section, because my contract cover letter does not expressly refer to it. I then immediately raised my query with you.

LCAD will have a better sense than me as to how my contract should be interpreted under the law applicable to the Secretariat, in my particular circumstances. They should now be involved to guide review of this matter.

I trust that sense will prevail on review of this decision.

Regards
Paul”

26. Thus, with Mr Hibberd’s realisation that he would not be paid expenses of his moving back to Australia - began the present dispute.

27. He received further correspondence from the Secretary General and Assistant Secretary General. On 11th April 2011 the Secretary General wrote:

“Dear Paul,

... I requested colleagues to undertake a careful examination of the issues you raised concerning your eligibility or otherwise for benefits accorded “overseas recruited staff members”. While I have some sympathy for your particular circumstances, the application of the existing policy in your case is consistent with the policy requirements and practice of the Secretariat. It has therefore been concluded that there is no scope for extending these benefits in your case under the current policy and contractual obligations. Your holding of dual nationality, including that of the UK, means that the core criterion governing eligibility for these benefits (that “stay in the UK is contingent upon the staff member’s employment with the Secretariat”) is not met in your case.

As part of the examination of this matter, I am advised that while different international organisations vary in their criteria relating to eligibility for benefits reserved for overseas staff, the Commonwealth Secretariat’s approach is not unique. Nevertheless, as we are currently reviewing our terms and conditions of service, with a view to aligning these with international norms, I have asked that the policy in this area be re-examined. Should changes be made to current policy, any new provisions could of course normally be expected to apply to existing staff (from the date of the change) as well as to new recruits.

Finally, you have raised a specific question regarding financial assistance to return to Australia at the end of employment with the Secretariat. I have asked the Assistant Secretary-General to provide a considered response on this separately.”

The matter was duly followed up by the Assistant Secretary General on 9th May 2011 as follows:

“... Having now had an opportunity to consider carefully the question, including on the basis of advice from Human Resources and Legal Counsel, I regret to advise that under existing provisions and established practice we would not provide financial assistance for your expatriation to Australia at the end of your employment in the Secretariat. The limited assistance we provide to UK nationals recruited from abroad (including yourself) to help defray their moving costs to London is based on the principle, established in Rule 68, which provides for a financial grant for all staff (including UK nationals) recruited from within the UK but “beyond daily commuting distance of London”.

While I know this news will be disappointing, I would like to advise that, in accordance with the SG’s request, we do intend over the coming months to review our current TACOS policies.”

28. Over the course of his employment Mr Hibberd had some dealings with a Mr Perera . Mr Perera was a dual national of the UK and Sri Lanka. . It appears that Mr Perera was initially offered ORSM relocation benefits in error and was initially paid more by way of accommodation allowance than (as a non-ORSM) he was entitled to receive. However the Respondent states (and we accept) that the error was brought to Mr Perera’s attention when he reported for duty. Thereafter he was treated as a person who, by virtue of having UK nationality, was not entitled to ORSM benefits.

29. On 20th May 2011 Mr Hibberd submitted his present application to the Arbitral Tribunal.

30. It appears that Mr Hibberd subsequently resigned.. We know nothing of the circumstances in which this occurred. It should be recorded, however, that his appraisal shows him to have been a highly valued member of staff, rated as “outstanding”.

The Application and subsequent pleadings

31. In his application to the Arbitral Tribunal Mr Hibberd identified the contested decisions as follows:

“(a) The decision to treat the applicant other than as an ‘overseas recruited staff member’ or, in the alternative, the legality of the term ‘overseas recruited staff member’ under the principles of international administrative law applicable to the Secretariat, each alternative decision having the effect of rendering the applicant ineligible to receive certain allowances under the applicant’s terms and conditions of service.

(b) The decision to pay an installation grant of 7% of net salary, rather than the 9% rate for married staff members to which overseas recruited staff members are eligible under Rule 72 of the Staff Rules.

(c) The decision that the applicant's contract does not cover repatriation allowances (relocation, subsistence and installation grant) for his return to Australia upon the end of employment with the respondent."

32. Point (a) is based on his contention that the failure to accord him the benefits applicable to an ORSM was in breach of the principle of equality and non-discrimination. He suggests that as an overseas resident recruited from Australia he has been treated less favourably by reason of what he contends to be irrelevant and unjustified criterion of being a UK national. He accepts in his Reply that he does not satisfy the definition of ORSM and it is the definition or the Respondent's reliance on it which he claims is the discriminatory treatment.

33. Point (b) has the same basis, as we understand it, as (a) but with the additional observation that the ORSM benefits he says he should have been offered ought to have extended to a 9% allowance under the terms in section G because this is the level specified for married people.

34. Point (c) concerns the denial of what he describes as repatriation allowances. It appears to be a claim that he is entitled to some form of "mirror image" benefits (in respect of return to Australia) to those explicitly offered to him in respect of his transfer to the UK. His central complaints here are that the Respondent had failed to make clear that he would not receive such an allowance, that the contract should be construed contra proferentem, alternatively that the principles of good faith and estoppel prevented the Respondent from denying an entitlement. In his Reply he supplements these contentions by reference to what he characterises as the Respondent's duty of care and its alleged obligations not to make misrepresentations or not to draw mistaken conclusions of fact and to follow due process during the contract formation process in as well as an obligation to afford equal treatment and to act fairly.

35. In the Rejoinder the Respondent challenges the Applicant's right to supplement his original grounds. The Arbitral Tribunal has been prepared to consider them essentially as developments of his original grounds.

36. The Respondent in its Answer and Rejoinder contends that there was no unlawful discrimination or breach of the principle of equality in denying ORSM benefits to a UK citizen because the UK citizen's right to stay in the UK is not contingent on their employment with the Respondent.

37. It contends that there was no entitlement to repatriation allowances under the terms (and in ORSM) and that the terms were clear cut to what the Applicant would receive. He was not misled and there was no basis, under the contra proferentem principle or, otherwise for awarding him repatriation benefits.

Analysis and conclusions

Equality/non-discrimination

38. The principle of equality or non-discrimination is well established in the law of the international civil service. It has been expressed in many different ways in the cases very helpfully cited to us, of which we cite three examples. The principle has been said to require as follows:

(i) "the adoption and implementation of impartial, reasonable and objective rules which provide the same juridical treatment for similar case" ILOAT Judgment No 2979 para. 4

(ii) "comparable situations should not be treated differently unless such differentiation is objectively justified" - Hochstrass v Court of Justice of European Communities (Case 147/79) (CJEU) para. 7

(iii) "persons in like situations be treated alike and that persons in relevantly different situations be treated differently ... in most cases the question is whether there is a relevant difference warranting the different treatment involved" ILOAT Judgment No2313

39. There is no dispute that the principle is engaged where the alleged difference of treatment relates to a matter of status such as nationality. Equally it is clear that the use of nationality as a criterion for benefits or disadvantages is not necessarily discriminatory: see Hochstrass (above), Serio v Commission of the EAEC Case 62/65 [1966] ECR 561

40. The Applicant's case is in substance that as a naturalised Australian who is normally resident there (and who was recruited "from" Australia)

(i) he is in a comparable situation to that of an Australian national without dual nationality (or a comparable situation to that of a person of some other nationality who is not also a UK national);

(ii) that his UK nationality is not a “relevant difference” between his case and that of an Australian (or a person of some other nationality) who is not also a UK national ;

(iii) that the difference in treatment is not “warranted” or “objectively justified” by British nationality , at least in a case such as his where prior residence was in Australia, so that he had to move to the UK to take up the job.

41. The underlying thrust of his argument is that, if any distinction is to be made as to who qualifies for the “generous” relocation “package” granted to ORSMs, it should be based on residence not on nationality. If residence were the criterion he would qualify since he was recruited from Australia. He says that to disqualify him because of the “fortuitous” feature that he holds a British passport makes no sense.

42. We have limited information as to the reason behind the definition excluding UK nationals from the ORSM benefits irrespective of residence or dual nationality but it is essentially self-evident.

43. The Respondent recruits from all of the Commonwealth countries. This is built in to its human resources equality policies which refer to maintaining an “appropriate geographical balance” (para. 3 of Recruitment and Selection policy, p. 57 Yellow Book). It is also committed to affirmative action in recruitment and selection “to reach a wider pool of applicants by circulating job advertisements to Commonwealth countries” (Para. 3 Recruitment and Selection policy, p. 57 Yellow Book). Its mission is also to secure the best candidates (see para. 9 of Introduction to Policies at p. 2 Yellow Book).

44. The Respondent has plainly judged it necessary in these circumstances to offer generous packages to include return as well as arrival.

45. However an employee who is not a UK national and whose right to remain in the UK is dependent on employment with the Respondent is in a specially vulnerable position. If the employment terminates the individual is, ex hypothesi, liable to be expelled from the UK. The generous package applicable in these circumstances (including, not least, the repatriation allowance) is clearly based on that special vulnerability. Offering such a package encourages applicants from around the Commonwealth to apply for and to accept work for the Respondent in London and provides “insurance” against financial difficulties on the termination of the contract (which could of course occur early and unexpectedly). Such “insurance” is an important safeguard given the employee’s inability to stay on in London and earn his or her return fares and relocation costs by working for another employer.

46. It seems to us that UK nationals (whether or not they hold a second passport) are not in a comparable situation to such individuals. They are not vulnerable to expulsion on the termination of employment and can seek alternative work in the UK without restriction. This is true whether they were previously resident abroad or not. They do not require the same protection.

47. Even if the situation of the UK national recruited abroad is sufficiently comparable for the purpose of the rule against discrimination, we conclude that the liability to expulsion, is a relevant difference warranting (or, if necessary, justifying) the more favourable treatment. It is legitimate for the Respondent to conclude that a UK national having the right of abode in the UK, does not need the same protection and incentives. It must also be the case that the Respondent has fewer inherent difficulties in recruiting UK nationals (because it is located in the UK) than in recruiting nationals of other commonwealth countries.

48. Of course, it would be open to the Respondent to introduce different rules whereby either relocation benefits were equal for all or whereby they were based, for example, on residence, not nationality. We are not saying that the present rule is “better” than other rules which may be under consideration. But we see nothing illegitimate in giving special protection to those who most need it (namely those who are liable to deportation when their employment ends).

49. It is relevant also to test the natural limits of the Applicant’s argument and to explore the difficulties inherent in alternative rules.

50. His own circumstances are at one end of the scale: he is clearly normally resident outside the UK and there are no significant indications that he intended to settle in the UK once his employment with the Respondent was over. But a rule based on prior residence alone would on its face confer the benefits on all UK nationals who were living abroad (whether or not they had dual nationality) including those who

planned to settle in the UK or who came to the job without fixed plans. It might also attract (although this is slightly speculative) those UK nationals who were looking merely to fund a move back to the UK.

51. Moreover, in the modern world where many people move from country to country with unfixed or ever-changing plans, the concept of residence (or normal or ordinary residence) is a far from precise one. Its application would give rise to much uncertainty and debate in individual cases. We note that in *Hochstrass* the European Court considered (see especially paragraph 13 of its judgment) that it was legitimate to use nationality (rather than residence) as a basis for certain staff relocation allowances given the objective and uniform nature of that criterion. Nationality was, it said, “directly related to the purpose of the rules, namely to compensate for the difficulties and disadvantages arising from the status of an alien in the host country”. The same is true here.

52. Of course a residence criterion could be qualified by a requirement that the individual must also be a national of a country other than the UK. But such a criterion might itself give rise to similar complaints to those the Applicant now makes: in particular from UK nationals without dual nationality living abroad who did not intend to settle in the UK after employment with the Respondent was over.

53. We conclude, after careful reflection, that the Respondent has not breached the principle of equality or non-discrimination by restricting the ORSM benefits to those liable to expulsion from the UK following the termination of employment with the Respondent.

54. As regards the installation grant we note that Mr Hibberd was in any event paid the same amount (7% of net salary) as he would have received if he had been treated as an ORSM.

Repatriation allowances

55. Mr Hibberd appears simply to have assumed that having been recruited with relocation benefits he would receive “mirror image payments” on departure. (It is not necessary given the conclusion we have reached to explore or define precisely what these benefits would be).

56. The contract, does not provide for departure or repatriation payments. It is very specific as to the benefits he will receive. They include certain costs of the inbound trip (“Canberra to London”) but not of the outbound.

Contra proferentem

57. Ambiguous contracts fall to be construed against the party who produced the document (“contra proferentem”).

58. We do not consider that there is any ambiguity in the contract which falls to be construed. It spells out that Mr Hibberd will receive, so far as relocation is concerned, the three benefits listed and no more. It does not provide for repatriation benefits.

Good faith, mistake, misrepresentation and estoppel

59. We deal with these points together.

60. We conclude that there was no representation here that Mr Hibberd would receive more than he did and no element of bad faith or relying on the contract as drawn. There was no mistake on the part of the Respondent and no misrepresentation.

61. Ms Benjamin and the HR department consistently responded with commendable clarity (and speed) to Mr Hibberd’s enquiries and made clear the limits of what was being offered. Mr Hibberd, a skilled lawyer who was taking a close interest in the terms, simply did not attempt to negotiate repatriation benefits before entering the employment beyond asking for the ORSM benefit package. When told that only the three benefits listed were on offer he accepted the offer, albeit hoping that there might be a policy change in the future.

62. Ms Benjamin - and subsequently Mr Cutts - were clear in saying that whilst policies were subject to review, there was no assurance of ever being able to offer Mr Hibberd anything additional to that which was in the contract. The Respondent was not taking unfair advantage of any wrong assumption Mr Hibberd may have made about receiving assistance for his return to Australia.

Duty of care and due process

63. We do not see how a “duty of care” is said to arise in this situation. But by responding clearly, accurately and promptly to all his enquiries the Respondent discharged any possible general or implied duty it might have had.

64. The process observed in forming the contract was a proper one. The Respondent had no obligation to depart from its general policy and terms in Mr Hibberd's case and was not obliged to amend them when he indicated his dissatisfaction. There was a continuing policy review but it was made very clear to Mr Hibberd throughout that he could not depend on any changes being made. The Respondent did not breach any obligation to Mr Hibberd in declining to change its policy over the course of his employment.

Equality and fairness

65. We can detect no possible breach of any general duty to treat the employee fairly and equally with others in like situations.

66. Mr Hibberd has referred to the treatment of a Mr Perera who was also a dual national. It appears that Mr Perera was paid an additional amount by mistake but this confers no entitlement on Mr Hibberd. Mr Hibberd points to a lack of clarity in communication with Mr Perera and it would indeed appear that there was a mistake in the Respondent's telling Mr Perera he would receive benefits to which he was not entitled. But there was no such mistake made towards Mr Hibberd. In his case the Respondent's communications were clear and accurate. The fact that the Respondent subsequently corrected the position with Mr Perera and is not treating him as a person entitled to ORSM benefits demonstrates even-handedness rather than inequality in comparison with Mr Hibberd.

67. We fully understand that it may have come as a surprise to Mr Hibberd, after he had taken such an interest in his relocation costs, that he would not be paid repatriation benefits but this was not the fault of the Respondent. There was no breach of any duty of equality or fairness.

SUMMARY OF PRINCIPAL CONCLUSIONS

68. The rule restricting ORSM benefits to those who are liable to expulsion at the end of their employment is a valid one and does not infringe the rule against discrimination.

69. The Applicant was not entitled to ORSM benefits or any "repatriation" allowances under the clear terms of his contract. There was no breach of duty towards the Applicant in maintaining those terms.

DISMISSAL OF THE CLAIM

70. The claim is dismissed in its entirety.

COSTS

71. The tribunal has decided that no award of costs should be made to either party.

Given on this 30th day of May 2012

Signed

Christopher Jeans QC, President

Justice R N Ukeje OFR, Member

Mr Chelva R Rajah SC, Member