

CSAT APL /20 (No 2)

*THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL IN THE MATTER OF  
JULIUS NDUNG'U KABERERE*

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Review Board constituted by

Mr D K Oabee SC; Mr Justice Seymour Panton OJ, CD; Mr Chelva Rajah SC;

Mr David Goddard QC and Mr Arthur Faerua

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## JUDGMENT ON APPLICATION FOR REVIEW

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Introduction:the application before the Tribunal

1. The Applicant, Mr Julius Kaberere, has applied for a review ("the Application for Review") of the Judgment of a 3 member panel ("the Initial Panel") of the Commonwealth Secretariat Arbitral Tribunal ("CSAT") dated 26 July 2013 ("the Judgment"). The Judgment dismissed the Applicant's claims arising out of the circumstances surrounding his resignation from the Commonwealth Secretariat.

2. As required by the Statute establishing CSAT, the President of CSAT has convened a Review Board to consider the application for review comprising five panel members of CSAT who did not sit on the Initial Panel that delivered the Judgment.

3. The Application for Review was expressed to be made on the grounds that CSAT "failed to exercise its jurisdiction or competence on a question of fact or law or both". The specific grounds relied on by the Applicant, which are set out in paragraph 32 below, raise questions concerning the exercise of its jurisdiction or competence by CSAT, whether the Initial Panel erred on a question of law or fact (or both), and whether the Initial Panel acted unreasonably.

4. The Review Board has considered all of the specific and general grounds of review advanced by the Applicant, and has concluded that those grounds have not been made out. The Review Board is not persuaded that the Initial Panel erred in law or fact, or arrived at an unreasonable decision on the basis of the material before it. Nor does the Review Board consider that there was any failure to exercise jurisdiction in a manner that had any adverse effect on the interests of the applicant. The reasons for these findings are set out below.

The facts giving rise to the dispute

5. The relevant facts are set out in detail at [12] to [65] of the Judgment. None of the Applicant's criticisms of the Initial Panel's finding scall into question the factual findings in those paragraphs of the Judgment. Accordingly this review can, and must, proceed on the basis of these factual findings. We need do no more than summarise them here.

6. At the time the dispute arose, the applicant was employed by the Secretariat as Adviser, Technical Co-operation and Strategic Response in the Government and Institutional Development Division. He was employed under successive fixed term contracts, the last of which was a three year contract expiring on 11 January 2013. On 6 February 2012 he gave three months' notice of his intention to resign from this position, as contemplated by his employment contract. His resignation was given with a view to returning to his home country, Kenya, to stand for election as Governor of Murang'a County.

7 After that notice was given, but before his resignation was effective, certain issues relating to the Applicant's conduct were raised by the Secretariat. A letter from DSG Ransford Smith setting out three "concerns" was sent to the Applicant on 24 February 2012. The Applicant was invited to respond either in writing, or at a meeting in due course. Those concerns were described as follows:

The first concern relates to a meeting of the "Kenya Diaspora Forum". Information received...suggests that you are the Managing Director of this Forum and that funds from the Commonwealth Secretariat were to be used to hire a venue for this meeting. I note that such funding does not appear to have been authorised in line with the terms of reference for the relevant programme and as such should not be funded by the Commonwealth Secretariat...

The second concern relates to your announcement last December of your intention to run for elected office in Murang'a County, Kenya, and that you have apparently engaged in political activities in support of this campaign whilst employed in the Commonwealth Secretariat. As you would be aware the Regulations... prohibit staff members from engaging "in any political activity which is inconsistent with or might reflect on the independence and impartiality required by their status as being in the service of the Commonwealth countries collectively" and require disclosure in advance to the Secretary-General so that appropriate decisions can be taken.

The third concern relates to your apparent breach of the clear directive communicated to you from the Office of the Secretary General regarding sending emails to staff, coupled with the additional issue of the tone and potential defamatory nature of your emails dated 15 February 2012.

8. That letter was followed by a letter from Jose Maurel, Acting DSG, dated 22

March 2012 informing the Applicant that he was suspended under Staff

Regulation 19. The letter referred to the concerns set out above, and two further concerns relating to:

(a) work that the Secretariat considered the Applicant might have done for

"DVK Group" without the Secretary-General's permission to engage in outside work; and

(b) the Applicant's Blackberry bill - an explanation for the size of the bill

was sought, and the Applicant was reminded that the cost of personal calls should be reimbursed.

9. The Applicant responded by letter dated 28 March 2012 setting out his position on these matters. He was critical of the procedure that had been adopted. He also responded to the substance of the concerns raised, explaining why in each case he considered that there was no proper basis for concern.

10. Correspondence on these issues continued through April, and into early May 2012.

11. At the time of the Applicant's suspension, the Secretariat had also decided to withhold his salary while he was suspended. However on 19 April 2012 the Applicant was advised that his representations on this issue had been considered by the Secretary-General, and a decision had been made to reinstate his salary from the date of suspension.

12. The Applicant ceased to be an employee of the Secretariat on 5 May 2012.

13. On 21 May 2012 Mr Maurel wrote to the applicant advising that he had been charged by the Secretary-General with taking matters forward. He said that he had formed the view that there was "sufficient material to warrant a disciplinary panel".

14. On 25 May 2012 the director of the Legal Division wrote to the Applicant noting that he accumulated a significant bill on the Blackberry provided to him for official purposes during his recent absence from work on sick leave. He said that the cost of personal calls should be reimbursed to the Secretariat. He also noted the exchanges about disciplinary proceedings and observed that withholding of gratuity was one of the sanctions permitted if an adverse conclusion was reached in the disciplinary process.

15. The Applicant wrote to the Secretary-General on 25 May 2012 stating, among other matters, that having taken further legal advice he believed he was no longer bound by the provisions of the Sutherland handbook (ie the Staff Regulations, Rules and policy material for Secretariat employees set out in this handbook) because his employment had ended on 5 May 2012. Accordingly he said that the convening of a Disciplinary Board at this stage would be unlawful.

16. That was followed by a letter from the Applicant dated 26 May 2012 claiming that the decision to withhold his gratuity was a breach of contract.

17. As recorded in the Judgment, the difference of views in relation to the gratuity was ultimately resolved by the Applicant agreeing to deduction from the amount payable of the cost of his private calls on his Blackberry, and the Secretariat paying the Applicant the balance of the gratuity, with interest.

18. On 14 July 2012 the Applicant wrote to the Chair of the Disciplinary Board convened to hear his case, requesting that any sittings of the Board should be suspended. Among other matters, he stressed that his employment had ended on 5 May 2012, and expressed the view that disciplinary procedures could not now lawfully be applied.

19. On 25 July 2012 the Disciplinary Board, through its Secretary, wrote declining to suspend the Board sittings in the absence of any "order of stay". However sittings were delayed for administrative reasons, and the composition of the Board was changed. The Disciplinary Board hearing was rescheduled for 30-31

October 2012. It appears that it took place on those dates, in the Applicant's absence. The outcome of that hearing was not before the Initial Panel and is not before the Review Board: CSAT has not

1 The Applicant's employment contract provided the option of participating in a "pension gratuity" scheme, under which the Secretariat would make certain specified contributions to the scheme, and at the end of the contract the staff member would receive an ex gratia payment of the cumulative amount paid into the scheme by the Secretariat, including interest. It appears that the Applicant had opted to join the gratuity scheme.

Been asked to determine any issues in relation to the Disciplinary Board's proceedings or conclusions. The Applicant's original application to CSAT

20. The Applicant made his original application to CSAT on 31 July 2012.

21 The first issue raised by the application was the lawfulness of the Disciplinary Board hearings. The Applicant sought an order staying the Disciplinary Board proceedings, and a determination that it was unlawful to hold those hearings.

22. By the time the Initial Panel was convened, and a Judgment delivered, the Disciplinary Board hearing had already taken place. So the first limb of this application - the request for an order staying the Disciplinary Board proceedings - had been overtaken by events. We consider the significance of this below.

23. The Initial Panel went on to find that in the circumstances of this case, it was open to the Secretariat to progress disciplinary procedures after termination of the contract of employment. That finding is not challenged before the Review Board.

24. The Applicant had challenged the withholding of his gratuity. However the parties' differences in relation to the payment of the gratuity had been resolved by the time the matter came before the Initial Panel. The Initial Panel considered that it was neither necessary nor appropriate for it to express any views on the issues canvassed by the parties in relation to the gratuity, in those circumstances.

25. The Applicant argued that he had been constructively dismissed, claiming the value of his salary and benefits to the date when his contract was due to expire in January 2013. The Initial Panel rejected this claim, finding that the Applicant's resignation resulted from his desire to run for political office in Kenya, and not from any conduct of the Secretariat. In particular, it did not result from any conduct of the Secretariat that could amount to a constructive dismissal.

26. Next, the Applicant challenged his suspension. He said that it was unlawful, and involved discrimination and victimisation.

27 The power to suspend an employee is set out in Regulation 19 of the Staff Regulations, which provides as follows:

If a charge of misconduct is made against a staff member and the Secretary-General is satisfied that a prima facie case has been established, the staff member may be suspended from duty, with or without pay, during investigation, the suspension being without prejudice to the rights of the staff member.

28. The Initial Panel found that there was a prima facie case of misconduct.

Because this finding is the subject of a challenge before us, we set out in full the relevant passage from the Judgment:

114. Here there was a prima facie case of misconduct. The detail was properly set out in the letter from DSG Ransford Smith of 24th February 2012 and in the suspension letter of 22nd March which referred back to Mr Smith's letter.

115. As regards grounds provided for his suspension we note that in relation to the Kenya Diaspora Forum, the material indicating that he had sought ComSec monies on behalf of the Forum without prior authorisation did not appear to be disputed by him, even when he replied in detail to the accusations on 281

March 2012. His case that no money actually changed hands

Was, even once articulated, not a self-evident answer to concerns based on conflict of interest and the need for clearance by a line manager. We express no conclusion on the matter beyond saying that there was certainly a prima facie case here.

116. As regards political activity the most basic facts appear to have been undisputed: that he had announced his intention to run for Governor around the time of a visit to Kenya on behalf of the Respondent and had set up a website for the purpose. We need not concern ourselves with such questions

as whether he was campaigning in Kenya whilst on sick leave from the Respondent (as might be inferred from reports in the Nairobi Star). Leaving aside such matters, the mere fact of declaring oneself a candidate in the wake of a mission on behalf of the Respondent raises serious issues and a prima facie case of breach of Regulation 19.

117. If, as we infer, the reference to derogatory emails is a reference to the email accusing Mr Cutts of taking an improper or unauthorised salary increase, then there would appear to have been no factual dispute that such emails were sent. The accusation was a serious one which should not be made lightly. Here also there was undoubtedly a prima facie case.

118. There is no reason to suppose that the decision to suspend was not the decision of the Secretary-General even though it was conveyed by Mr Maurel in the letter of 22nd March. The letter makes clear that the decision was the Secretary-General's. We do not understand, if an issue is being raised here, why a letter conveying the Secretary General's decision should not come from an "acting" Director.

119. The Tribunal's powers of review over such decisions are limited in any event, as the Respondent points out, but we do not need to explore those limits because we have no doubt that the Secretary General had a clear prima facie case to suspend the Applicant.

120. The Applicant's contention in correspondence that hearing procedures had to be observed before suspension has no basis in the Regulation.

121. Nor can we identify any other basis on which the suspension could possibly have been unlawful. The Respondent's officers acted in good faith and within their authority.

122. We can see no basis on which the suspension could be said to have led to "discrimination and victimisation". We deal above and below with various aspects of alleged discrimination and unequal treatment and we conclude that there was none. We suspect that in the present context the Applicant means simply that his good name suffered as a result of suspension. That is a wholly understandable concern but the Respondent acted within the scope of its lawful powers in suspending and the claim in relation to suspension fails accordingly."

29. The Applicant complained of unfair discrimination and unequal treatment in certain respects. The focus of these allegations was a comparison between the manner in which he had been treated, and allegedly more favourable treatment of two other former Secretariat employees who had engaged in political activity at or around the time they left their employment. These allegations were rejected by the Initial Panel on the basis that insufficient evidence had been provided to establish that the Applicant had been treated less favourably than those other employees.

30. Thus the Initial Panel rejected all of the Applicant's claims.

31. No order for costs was made: the Secretariat, which was the successful party, had not sought costs. The application for review

32. The grounds on which the Applicant says the Initial Panel erred are set out by the Applicant in his Application for Review as follows

"I. CSAT did not exercise its jurisdiction to issue a stay of proceedings of internal Comsec Disciplinary Board, that was to be convened to determine allegations against me (Judgment para 68 and 69).

II. CSAT Judgment finds that it's not unlawful to engage in political activity, but finds that I broke the rules when I declared my intent to run for elective office in future after leaving Comsec employment (129-135).

III. The finding that there was no discrimination and unequal treatment, following declaration of intent to run in Kenya's next General Election (Judgment Paragraphs 129-135).

IV. Failure of the original the CSAT to exercise its jurisdiction relating to my application that Comsec failed to apply its Disciplinary procedures/rules in timely manner.

V. Failure of CSAT to find that withholding of my Gratuity unlawful and that Gratuity equated to retirement benefits (para 94 & 95).

VI. Grounds of suspension not proven."

33. The Applicant seeks review of the Judgment. He asks the Review Board to make findings that his suspension was not justified, and that "the failure by the Tribunal to examine these matters led to miscarriage of justice". He seeks "an appropriate remedy, including setting aside the judgments and providing appropriate compensation."

34. The parties filed written submissions in relation to the application for review.

There was no request by either party for an oral hearing. The Review Board also considers that an oral hearing is not warranted. We have considered the application for review on the basis of the material before the Initial Panel, and the parties' submissions to us.

The Review Board's approach to this application

35. The grounds on which a party to proceedings before CSAT can seek review of a judgment of CSAT are set out in Article XI (5) of the CSAT Statute, which provides:

"5. A party to a case in which judgment has been delivered who challenges the judgment on the ground that the Tribunal has exceeded or failed to exercise its jurisdiction or competence, or has erred on a question of fact or law or both, or that there has been a fundamental error in procedure which has resulted in a failure of justice, or that the Tribunal has acted

Unreasonably having regard to the material placed before it, may apply to the Tribunal, within a period of 60 days after the judgment was delivered, for a review of the judgment."

36. Article XI (10) provides that a Review Board may affirm or rescind in whole or in part the judgment of the Initial Panel. Article XI (11) confers on a Review Board the power to substitute its own determination and make an

Order granting a remedy, to refuse to make any order granting a remedy, or to order a rehearing before a fresh panel.

37 The Review Board considers that it may review the Initial Panel's judgment, and rescind it in whole or in part, if and only if it is satisfied that one or more of the grounds in Article XI (5) has been established.

The burden in review proceedings is on the applicant for review to persuade the Review Board that one or more of these grounds is made out. In the present case, that means that the burden is on the Applicant to satisfy the Review Board that the Initial Panel failed to exercise its jurisdiction or competence, erred in law or fact, or reached an unreasonable conclusion on the material before it.

38. It is not the role of the Review Board to reconsider every aspect of the Judgment of the Initial Panel: rather, the role of the Review Board is to consider the specific errors alleged by the Applicant, to determine whether the Judgment of the Initial Panel is erroneous in those respects, and if so, to determine what orders should be made under Article XI (10) and (11).

Determination of the application for review

Grounds I and IV: failure to exercise jurisdiction to stay disciplinary proceedings

39. The first and fourth grounds raised by the Applicant are essentially the same: the complaint is that CSAT did not exercise its jurisdiction to issue a stay of proceedings of the Disciplinary Board, or otherwise deal with the matter in time to forestall the pending hearing by the Disciplinary Board.

40. The Review Board considers that it is important that applications for preliminary orders be promptly considered and determined. We do not know why the application for a stay of the proceedings of the Disciplinary Board was not considered and determined before the hearing was scheduled to take place on 30 to 31 October 2012.

41 However, the challenge to the continuation of the Disciplinary Board proceedings was founded solely on the argument that such proceedings could not be brought after the end of the Applicant's employment.

That argument was rejected by the Initial Panel, and that aspect of the Initial Panel's decision is not challenged before the Review Board. So the hearing before the Review Board must proceed on the basis that it has now been finally established that there was no barrier to the Disciplinary Board holding a hearing, and determining the matters before it. In those circumstances, there is no basis on which the Applicant can claim to have been unfairly prejudiced by the continuation of the disciplinary proceedings, or by the absence of a stay of those proceedings.

42. We also note that the original application to CSAT did not identify any prejudice that would be caused to the Applicant if the disciplinary proceedings were to continue, with their validity being determined by CSAT at a later date. If the application had been considered on the basis of the papers filed, it is difficult (if not impossible) to see how it could properly have been granted.

43. For the sake of completeness we record that the Applicant does not suggest in his application for review that he refrained from participating in the Disciplinary Board proceedings (if, as we infer, that is indeed what happened) on the basis of a belief or expectation that CSAT would stay those proceedings.

He knew that no stay had been granted at the time the disciplinary proceedings took place, and made his decision on whether to participate in those proceedings in the knowledge that the outcome of his challenge to its jurisdiction remained to be determined.

Ground II: Findings in relation to engaging in political activity

44. The second ground raised by the Applicant proceeds on the basis of a misunderstanding about the nature of the findings of the Initial Panel. The Initial Panel was asked to consider a challenge to the suspension of the Applicant under Regulation 19 of the Staff Regulations. That suspension power may be exercised where the Secretary-General is satisfied that there is a prima facie case of misconduct by a staff member. The Initial Panel found that there was prima facie case of misconduct. The Initial Panel was not required to find, and did not find, that the Applicant "broke the rules"

45. In particular, there is no such finding at [129] to [135] of the Judgment, which deal with the Applicant's allegation of discrimination. In those paragraphs, the Initial Panel explains that it does not have sufficient information before it to justify any finding that the Applicant has been discriminated against, by comparison with the other Secretariat employees to whose circumstances he made reference.

46. At [134] the Initial Panel observed that "in any event the action taken against the Applicant in the present case was taken on proper grounds and for good reason." This is a reference back to the earlier discussion in the Judgment concerning the existence of a prima facie case of misconduct. As we have explained above, the Initial Panel's finding that there was a prima facie case of misconduct is not a finding that the Applicant did in fact engage in any misconduct i.e. it is not a finding that he "broke the rules".

47. Because this issue appears to be of particular concern to the Applicant, we emphasise that there has been no finding by either the Initial Panel or by this Review Board that the Applicant engaged in any misconduct, or broke any rules applicable to his employment. Nothing in the Judgment of the Initial Panel, or in this judgment of the Review Board, should be understood as making any adverse finding in relation to the conduct of the Applicant. The limited scope of the matters before CSAT meant that it was neither necessary nor appropriate for any finding to be made as to whether the Applicant had engaged in any misconduct, and no such finding was made.

Ground III: no discrimination or unequal treatment

48. As noted above, the Initial Panel found that there was insufficient evidence of any differential treatment of the Applicant, as compared with certain former employees of the Secretariat that he considered had been treated more favourably. Accordingly, there was insufficient evidence of any discrimination or unequal treatment.

49. The Applicant argues in his submissions to the Review Board that the Initial Panel should have inquired further into these matters. That submission is not consistent with the nature of proceedings before CSAT, in which the parties are responsible for presenting their case, including calling any necessary witnesses and presenting relevant documents.

Rule 5 of the CSAT Rules requires the applicant to specify in their Application any preliminary orders sought for the production of additional documents, or the hearing of witnesses. Rule 13 permits a party to request oral proceedings, including the presentation and examination of witnesses.<sup>2</sup> In this case, the Applicant did not ask for any preliminary orders for disclosure of documents or for evidence to be taken from witnesses. He did not request an oral procedure, or seek to call any witnesses to support his allegations. If the Applicant wished to supplement the documentary material that he had provided in order to make out his claim of discrimination, it was incumbent on him to take the necessary steps to do so. In the absence of such steps, it was appropriate for the Initial Panel to consider and decide the matter before

It on the basis of the documents submitted by the parties.

50. We agree with the Initial Panel that the Applicant's complaint of discrimination and unequal treatment was not made out on the basis of the material provided to the Initial Panel.

Ground V: gratuity

51. The Applicant complains that the Initial Panel failed to find that withholding his gratuity was unlawful, and that the gratuity equated to retirement benefits.

52. The Initial Panel declined to deal with the Applicant's complaints in relation to the withholding of his gratuity because it considered that no live issue remained. By agreement between the Applicant and the Secretariat, part of his gratuity was applied to meet the cost of personal use of his Blackberry. The balance was paid out to him with interest.

53. The Initial Panel considered that in circumstances where an agreement had been reached, and the balance of the gratuity paid with interest, it was neither necessary nor appropriate for it to express views on the ability of the Secretariat to withhold the Applicant's gratuity. The issues raised by the Applicant could have no bearing on any relief sought.

The submissions of counsel for the Secretariat refer to a provision relating to oral proceedings that does not form part of the current Rules of the Tribunal. It is Rule 13 of the Tribunal's Rules that governs the circumstances in which there will be oral proceedings.

54. The agreement reached does not appear to have been a formal settlement agreement, and it did not affect CSAT's jurisdiction to inquire into and determine any claim in relation to the payment of the Applicant's gratuity. We understand the Initial Panel to have decided that although it had jurisdiction to consider these matters, it was not required to exercise that jurisdiction, and in all the circumstances of the case it was not appropriate for it to do so. We agree that it was not necessary for the Initial Panel to determine these issues, and we consider that the Initial Panel did not fail to exercise its jurisdiction or competence or err in law, and did not act unreasonably, in declining to determine these issues.

Ground VI: grounds of suspension not proven

55. Finally, the Applicant argues that the grounds for his suspension have not been made out. As noted above, the Applicant was suspended under Regulation 19. That power is exercisable if and only if the Secretary General is satisfied that a prima facie case of misconduct has been established.

56. Because the threshold for suspension is a prima facie case of misconduct, there is no need for the allegations of misconduct to be "proven" before the power to suspend is exercised. It is sufficient that there was at that time a prima facie case of misconduct. Indeed it may be sufficient that it was reasonably open to the Secretary-General to consider that a prima facie case of misconduct had been made out. But that is not an issue that we need to decide in this case, as the Initial Panel proceeded on the basis of the higher threshold, more favourable to the Applicant, asked whether the test of a prima facie case of misconduct was satisfied, and found that it was.

57. We have carefully reviewed the material before the Initial Panel in relation to this issue. For the reasons given by the Initial Panel, we are satisfied that there was a prima facie case of misconduct. We agree with the Initial Panel's findings at [114] to [117] of the Judgment, which are set out in paragraph 28 above.

58. We also agree with the Initial Panel's observation that CSAT's powers of review over such decisions are limited, but that it was not necessary to *explore* those limits because there was a prima facie case sufficient to warrant a suspension.

Orders

59. We dismiss the Application for Review and affirm the Judgment of the Initial Panel.

60. The Secretariat did not make any application for costs. We order that each party bears its own costs in relation to this application for review.

Delivered on 30 April 2014

Signed

Mr Chelva Rajah SC, Presiding Member

Mr Justice Seymour Panton OJ, CD Member

Mr D K Dabee SC, Member

Mr David Goddard QC, Member

Mr Arthur Faerua, Member