

IN THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF:

DERRICK AKINTADE

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal constituted by

Mr Christopher Jeans QC, President; Mr Chelva Rajah SC, member and Justice Sandra Mason, member.

JUDGMENT

Overview

1. Mr Derrick Akintade was employed by the Respondent as a specialist adviser. He served two complete three-year fixed terms.
2. His post was disestablished in March 2014. The work of his entire section was discontinued.
3. He remained doing minimal duties, alone in a defunct section whilst redeployment was explored.
4. Eventually it was decided that there was no suitable alternative post for him.
5. He was issued with a notice of termination by reason of redundancy in September 2014.
6. In these proceedings he challenges the lawfulness of that termination.
7. Central to his case are the contentions that, despite the disappearance of his work and the section in which he was employed,
 - (i) he had at least a “legitimate expectation” of a further three year contract and
 - (ii) the termination was insufficiently reasoned.
8. Whether these, or his related contentions, are well founded depends, of course, on a careful assessment of relevant contractual provisions. It also depends on a far more detailed analysis of the facts than the bald history we have set out above.
9. It is nonetheless important to keep sight of the “big picture”. Perspective can otherwise be lost.

Procedural matters

10. Mr Akintade applied for
 - (i) an oral hearing and
 - (ii) disclosure of certain documents.
- (i) Oral Hearing

11. The Tribunal does not commonly hold oral hearings but will do so if it is appropriate for the fair resolution of the issues.
12. At the outset of its deliberations the Tribunal formed the provisional view that an oral hearing was not warranted in the present case.
13. If the Tribunal had, in the course of considering the case, identified issues on which it considered oral evidence was necessary, it would have been necessary to adjourn and give directions for an oral hearing.
14. In the event the Tribunal encountered no such issues. Accordingly, judgment is given without an oral hearing.

(ii) Disclosure

15. The Tribunal can and does order disclosure of documents where it is appropriate for the fair disposal of the claims.
16. Disclosure is not ordered unless the documents sought are of sufficient relevance to the issues. Even then, there may be questions of whether it is proportional to require particular categories to be disclosed and objections based on such matters as confidentiality may have to be evaluated.
17. Relevance is inevitably a relative issue. Assessing relevance is frequently difficult without exploring the substantive issues in depth. This was true here.
18. In the present case the Tribunal embarked on its consideration of the substantive issues in the case with a view to assessing the relevance of the documents sought by Mr Akintade and the objections raised by the Respondent. If the Tribunal had formed the view that disclosure was appropriate, it would have adjourned consideration of those issues which might be affected by the disclosure. Such a course was followed in another recent case before the Tribunal (**Ototahor and Others v Commonwealth Secretariat APL 24-26**). In the event the Tribunal did not consider the documents sought to be relevant, or sufficiently relevant, to the issues in order to render a disclosure order appropriate. We will return to this after setting out the background facts and identifying the issues.

Terminology

19. In this judgment we will for convenience use a number of acronyms

- (i) "SASD" refers to Special Advisory Services Division
- (ii) "EAS" refers to the Enterprise and Agriculture Section
- (iii) "DSG" refers to the Deputy Secretary-General
- (iv) "ASG" refers to the Assistant Secretary-General.

20. We will at times refer to Mr Akintade as "the Applicant" and to the Commonwealth Secretariat as "the Secretariat" "ComSec" or "the Respondent".

The Background Facts

21. We find the background facts to be as follows. Our findings are based on the material provided to us and inferences from that material.

22. Throughout his employment with ComSec Mr Akintade was an Adviser (Enterprise Development) in SASD, holding the "professional" grade of "F". He reported to the Director of SASD.

23. He was engaged in January 2008 under a three year fixed term. A second three year contract took effect from the expiry of the first. The second term expired on 20th January 2014.

24. Thereafter he was employed under two successive six month engagements. The latter was slightly curtailed by termination on the ground of redundancy with effect from 31st December 2014.

25. It should be recorded at the outset that there are controversies surrounding the two six month engagements and the termination notice. We will explain these in due course.

26. His successive contracts incorporated the Staff Regulations and Staff Rules of the Secretariat.

27. The "Task Description"¹ issued to him at the outset of his employment was never varied, as he records². The "job summary" stated:

"The Adviser works with member governments to determine technical assistance needs in the fields of small and medium enterprise (SME) development ; manages a number of resulting

¹ Annex I to Application

² Paragraph 62 of his Application

projects and advises Secretariat divisions on competitiveness strategies for SME development, particularly in the Agricultural sector.”

28. He worked in the Enterprise and Agriculture Section (“EAS”). The job was plainly appropriate to his very considerable qualifications. He holds a degree in agricultural economics and masters degrees in business administration and international relations respectively.
29. It should be recorded also that Mr Akintade’s capabilities for and performance in the role were beyond question. Indeed the overall assessment of his performance was categorised as “Very good” in successive years³
30. It appears that from around early 2011⁴ ComSec undertook a long-term review as to the areas of work in which it would maintain and focus operations. By mid-2013 this had culminated in a “new strategic plan” for the organisation.
31. On 17th July 2013 ASG George Saibel issued an “ALLSTAFF” (or “Global”) email⁵ to employees on the staffing implications of the new strategic plan. The email recorded that work on the budget and organisation structure was continuing. It gave no details as to which jobs might be affected but stated that recruitment was frozen (except to “essential” posts). Of relevance to the present case was the further statement:

“2. Where contract renewals are due for post-holders in areas of work still to be clarified under the new Strategic plan, the six month rolling policy for six month extensions will apply”
32. The “six month rolling policy” was, we infer, a reference to an aspect of the “rotation policy” of the Secretariat, described in the (then current) version of the Sutherland Handbook (“the Handbook”) which is available to staff. The Handbook contained the Staff Regulations and Staff Rules and other materials of relevance to Secretariat staff.
33. It is appropriate at this stage of the history to introduce the Handbook and the rotation policy.
34. Part One of the Handbook comprised “*A Guide to Human Resource Management Policies and Procedures in the Commonwealth Secretariat*” (“the Guide”) As the Foreword to the Handbook explained, this Guide forms no part of the contract of the

³ See reference in his letter of 9th September 2014, Annex XXVIII Sub-Annex 14 to application

⁴ Answer para50

⁵ Annex VII to Answer

individual staff member. By contrast, as the Foreword confirms, the Staff Regulations and Staff Rules do form part of that contract. The written contracts of staff members expressly incorporate the Staff Regulations and Staff Rules. Mr Akintade's contracts were no exception.

35. The rotation policy is contained in the Guide.

36. Staff Rule 11 refers to the policy. Under the heading "Contracts" Staff Rule 11 states:

"All appointments and promotions to higher grades shall be on a fixed term contract basis. Officers in grades CS2-CS-6 [which under the modern classifications includes the Applicant's Grade of "F"] are subject to the Secretariat's rotation policy"

37. As it is described in the Guide (under the heading "Contracts" at paragraph 4) the rotation policy "*sets a limit on the time an employee may remain in the Secretariat's employment*". The detail is set out in an annex to the Guide (Annex 10) but paragraph 4.3 summarises as one of the "main points" the feature that staff in certain grades (including that which now corresponds to the Applicant's grade of "F")

"normally serve three three-year contracts in the Secretariat"

38. Paragraphs 4.4 and 4.5 then elaborate (and qualify) the policy as follows:

4.4 "In all cases the granting of the new contract within these periods of tenure will be subject to fully satisfactory performance and the needs of the Secretariat. Staff can expect to be formally notified of their departure date between six months and one year before the end of their contract.

4.5 The periods of tenure may be varied in individual cases to take account of the annual HR planning process, which takes into account both the needs of the Secretariat and the maintenance of continuity in divisions.

39. Reference must then be made back to the Staff Rules for the scheme whereby staff members are to be informed whether they will be offered a new contract and the consequences of failure to inform are prescribed. Staff Rule 16 states under the heading "Notice of a New Contract":

"16. Staff members employed on term contracts for any period of one year or more shall be informed in writing, whether they will be offered a new contract. Such information will, as far as practicable, be given to staff members not later than 6 months before the date of expiration of their contracts. Where information has not been so given the contract will be treated as having been extended for a period of 6 calendar months after the date on which such notice was in fact given."

40. In a case where the employee is given the information only at, or immediately after, the expiry of his contract the effect of this Rule is to extend the contract for a further six months.
41. The “rotation policy” and related Staff Rules were of more than passing interest to Mr Akintade when he saw Mr Saibel’s email of 17th July 2013.
42. His second three year term was to expire in January 2014. He was already aware on receipt of Mr Saibel’s email that the whole section in which he worked was likely to close. He believed that the Secretariat had a “long-standing indifference” to his section, EAS. As he saw it, this had been manifested in various ways including a previous recruitment freeze in the Section⁶. In his Application⁷ to the Tribunal he refers to a “final hammer blow” which the section suffered to its prospects of survival in June 2013. (This was later reinforced, he says, by a statement made by the Board of Governors in September 2013). He anticipated that there would no longer be an Enterprise Development function and so the need for its Advisers would, on the face of it, disappear.
43. On 9th September 2013 he wrote⁸ to Mr Damian Dunne, Human Resource Adviser. His letter refers to the Handbook and was clearly drafted with careful reference to the rotation policy as there set out. We will quote extensively from the letter, partly because it sets out his position in the debate which has ensued:
- “My current (second) contract with the Commonwealth Secretariat (Comsec) is due to expire on 21 January 2014.”
44. We interpolate here, since it has a minor relevance, that this contract was in fact due to expire on 20th January 2014, not 21st January. The letter continues
- As a staff member employed on a term contract of more than one year, I wish to be informed in writing whether I will be offered a new, third contract.
- Given that I am now approximately four (4) months away from the expiry of my current contract, I note that Comsec is required to give me information regarding the renewal of my contract not later than six (6) months before the date of expiration of the relevant contract...
- I am aware that decisions on contract renewals are based on a number of factors Including

⁶ Paragraph 60 of Application

⁷ Paragraph 61 of Application

⁸ Annex XXVIII sub-annex 14 to Application

- Satisfactory performance
- Good health
- Good conduct
- Non-redundancy

45. Mr Akintade then outlines his good performance, health and conduct. The letter continues.

“Finally, I have not been formally issued with any Redundancy Notice”

“On the basis of the above, I believe that I have a legitimate expectation of receiving a third, three-year contract unless otherwise informed in writing and in accordance with the requirements of the CSDR

I would appreciate an immediate response to this letter”.

46. We take Mr Akintade’s reference to not having been “*formally issued*” with a redundancy notice as an indication of his thinking. He had not yet been “formally issued” with such a notice but he could see that his job was about to disappear. Indeed he saw this so clearly that the redundancy notice would, in his eyes, be a formality. It was an important formality however. He was understandably anxious for clarification of the position given the imminent expiry of the contract.

47. He did not receive the “immediate response” for which he had asked but Ms Zarinah Davies, HR Director, met with him on 7th October 2013. Mr Akintade “recorded a few points” from the discussion in an email⁹ to her later that day:

“You drew my attention to the global email sent from George Saibel dated 17 July and the four points quoted therein. My understanding is that you believed point 2 is particularly relevant to my situation.

48. We interpolate that “Point 2” relates to the rotation policy and is discussed in paragraphs 31-40 above. The email continues:

“Based on the circumstances including the lack of clarity on final organisation structure, you are not as yet in a position to give an indication of whether my contract will be renewed. However you are hopeful that clarity will be forthcoming relatively soon.

I held the view that a “global” email could not substitute for individual notification given the differing situations faced by differing members of staff. Moreover, I made the point that I have not, at any time, been formally advised as to what my position or particular situation was,

⁹ Annex 28 Sub-annex 15 to Application

including lack of communication to date confirming to me that my post was one of those specifically under review

I have requested that clarification of my position be communicated to me in writing. I believe you consented to do this”

49. Mr Akintade’s desire for definitive information in writing about his own situation, (expressed, if we may say so, with admirable moderation) was for some time unavailing.

50. It must be recorded that between the summer of 2013 and the spring of 2014 the Secretariat did disseminate some information to staff not only in the form of “Global emails” but also orally in “Town Hall” meetings. There also appear to have been some exchanges with the Staff Association. The “Global emails “ (for example, from the Secretary-General on 7th November 2013¹⁰ , 19th December 2013¹¹ and 20th January 2014¹² and Mr Saibel on 12th November 2013¹³) recount developments on a very high level of generality and would have been of limited assistance to any individual needing information about his or her own personal future. We have not been provided with transcripts of the Town Hall meetings but it is not suggested that these meetings were used to discuss the situation of individuals. It appears however that an “overarching” organogram relating to the new proposed structure was provided at one Town Hall meeting mentioned in the Secretary-General’s email of 19th December 2013¹⁴ .That email states that Directors were still working with the Change Manager to complete the detailed structure.

51. By 31st December 2013 the winding down of activity in Mr Akintade’s work area was such that he was, as he describes it, “occupying a position in a non-functioning section, performing less than substantive duties as well as less than normal responsibilities”¹⁵.

52. His second three-year contract expired, however, on 20th January 2014 without his having learnt what, if any, further employment the Secretariat proposed to offer him.

¹⁰ Annex IX to Answer

¹¹ Also at Annex IX to Answer

¹² Also at Annex IX to Answer

¹³ Annex XVI to Application

¹⁴ Annex IX to Answer

¹⁵ Application para 48

53. On 21st January 2014 he received¹⁶ a letter from Ms Davies dated 20th January 2014¹⁷ offering what was described as a “new contract extension” up to 20th July 2014. This “six months’ extension” was stated to be
- “in line with the communication to all staff on 17th July 2013 on staffing implications of the new Strategic plan and further reaffirmed at the Town Hall meeting on 14 October 2013.”
54. It seems clear to us that, without being explicit on the point, the Secretariat was seeking to apply the default principle in Rule 11 which we have mentioned above: that is to say, the principle whereby employment is extended for six months if the Secretariat fails to inform the employee in good time whether a new contract is to be offered.
55. Mr Akintade does not appear to have signed the letter by way of acceptance, as he was invited to do. But he continued to work in his job (in so far as there was work to do) and drew his salary. Subject to the dispute we relate below (as to the *length* of contract to which he lays claim) he had clearly accepted the further employment offered.
56. On 24th January 2014 a “voluntary exit scheme” (VES) was announced. The email from Mr Saibel announcing the scheme made clear that the particular scheme was limited to those at grades J to P. However, staff in professional and diplomatic grades “will be treated on a case-by-case basis, not a general VES as is being applied to staff in pay grades J to P.” The Secretariat was not therefore ruling out the possibility of voluntary redundancy for, say, a Grade F professional such as Mr Akintade. Rather it was indicating that such applications would have to be considered on an individual basis. Such higher grade staff would tend to perform specialised tasks and would be less easily interchangeable than lower graded staff.
57. We should record that Mr Akintade did not at any stage seek voluntary redundancy. He wished to remain in the Secretariat’s employment.
58. On 31st January 2014 the Secretariat published and publicised information (In “Q and A” form) about potential redeployment for redundant staff on its website¹⁸. This was not yet of immediate relevance for Mr Akintade because his post had not been abolished.

¹⁶ Application para10

¹⁷ Annex 28 Sub Annex 17 to Application

¹⁸ All staff email at Annex XX to application Q and A s reproduced at Annex X to answer

59. On 17th February 2014 Mr Akintade wrote¹⁹ to Ms Davies, after taking legal advice, He contended that he had a “legitimate expectation “ of receiving a third three year term. He referred to this Tribunal’s judgment in the **Oyas** case which we discuss below. He also sought clarification of whether the offer in the letter of 20th January was of a contract extension or a new contract. Ms Davies replied by email on the same day that this was an extension, not a new contract. She said she anticipated responding on the “legitimate expectation” point within the next week.
60. On 12th March 2014 Mr Akintade wrote again²⁰ to Ms Davies. He noted the absence of a response on the legitimate expectation point. He alleged that the “non-award” of a third three-year contract was a breach of the legitimate expectation which he asserted. He claimed that the offer of a six month extension had been misleading. He invoked the grievance procedure for Contract and Administrative grievances.
61. Meanwhile the acting SASD Director Mr Watipaso (“Wati”) Mkandawire was in contact with the Secretary-General’s Office unsuccessfully seeking to secure Mr Akintade’s temporary transfer to the trade section. In an email dated 14th March 2014²¹ Mr Mkandawire makes the telling comment:
- “Derrick is basically doing nothing substantive as projects under EAS have been sunset.”
62. On 20th March 2014 Mr Akintade was finally informed of the abolition of his post. Ms Davies met with him that day together with the Acting Director Mr Mkandawire and the Staff Association Representative Ms Bruce. Mr Akintade made notes of the meeting in the form of an email²² which he circulated.
63. At this meeting Mr Akintade was informed that under the new strategic plan the work of Mr Akintade’s section, EAS, was being “*sunsetting*” and this entailed the “disestablishment “of his post which was “redundant”. He had the option of immediate compulsory redundancy or being considered for redeployment. Under ComSec’s procedures consideration for redeployment would entail resort to a “Screening Panel.” The function of the Screening Panel would be to identify current or anticipated jobs at the same grade or one grade lower which might be suitable. The Panel would comprise

¹⁹ Annex XXVIII sub-annex 18 to Application

²⁰ Annex XXVIII sub-annex 21 to Application

²¹ Within Annex XIII to Application

²² Annex XXVII sub-annex 14 to Application

the HR Director, another Director and a CSSA representative. We note that this is in accordance with the procedure in Annex 11 of the Guide in the Handbook.

64. Mr Akintade had a week in which to decide which option he preferred.
65. A letter of the same date (20th March 2014)²³ from Ms Davies was provided to Mr Akintade. It confirmed that the “redundancy” of the post resulted from its disestablishment on the restructuring of the organisation. It sets out the redeployment and Screening Panel processes and invited his decision within 7 days on whether to apply for consideration for redeployment.
66. In a letter of 27th March 2014 Mr Akintade opted for redeployment “without prejudice” to his contention that he had legitimate expectation of a new three year contract. The letter was also without prejudice to his complaint, which was gathering steam.
67. It is unnecessary for us to trace all the steps and correspondence by which his complaint proceeded into and through the informal and formal grievance processes over the succeeding months.
68. Suffice it to say that the informal stage ended with Ms Davies stating on 8th May 2014

“We maintain our position that the Secretariat has acted in accordance with the Handbook in regards to your contractual position and that there is no basis for your grievance”

She noted that he was entitled to seek further action under the procedure.

69. Mr Akintade proceeded to initiate a formal grievance²⁴. He “founded” this on three “core charges” he made against the Respondent :
- (1) “serious procedural irregularities”, focussing on failure to provide timely information and a timely six month contract extension;
 - (2) “unlawful non-renewal” of his contract, complaining of the failure to renew the three year fixed term, failure to give notice of non-renewal and failure to give adequate reasons;

²³ Annex XXVII sub-annex 13 to Application

²⁴ Annex XXXVIII to Application

(3) unfairness in failing to communicate a decision on non-renewal of the three year contract to Higher Officers of his Division; he contrasted this with treatment afforded to others.

70. It is relevant to underline the scope of the grievance at this stage because it is decisions on the grievance outcomes (culminating in dismissal of a final appeal by the Secretary-General) which he challenges in the present proceedings. Matters not covered by the grievance were accordingly not the subject of the decisions which he now challenges.

71. Under the grievance procedure an outside investigator Ms Lisa Graham, was appointed. She interviewed witnesses in June 2014.

72. Mr Akintade's six month extension was due to expire on 20th July. On 18th July Ms Davies wrote²⁵ to Mr Akintade offering a further six months extension to his employment. The letter states, somewhat obliquely, that it is "in line with" the Global email of 17th July on the implications of the new strategic plan but adds that the extension is "to enable you to continue with the redeployment process until the outcome is known". The letter makes clear that it is not a notice of termination. It invites his signature by way of agreement.

73. Again, however, it appears that Mr Akintade did not sign the offer letter but continued to attend the Secretariat and to draw his salary thus accepting (as we see it) the continuation of his employment subject only to the ongoing dispute about its duration.

74. Meanwhile Mr Mkandawire had not given up in his attempts to have Mr Akintade more usefully occupied than he could possibly be in a defunct section. In an email to the DSG²⁶ he stated in reference to Mr Akintade:

"I am of the view that we should use our resources productively and currently we have an idle resource that we are fully funding"

His description of Mr Akintade as an "idle resource" was not intended to be critical of the Applicant. Mr Akintade himself was clearly unhappy at having to endure what proved to be 11 months, as he puts it²⁷, "in a non-existent Section...condemned to

²⁵ Annex XXVII sub-annex 16 to Application

²⁶ Annex XXIII to Application

²⁷ Application para 63

undertaking peripheral activities which were a far cry from the substantive work” that he was “contracted to perform”.

75. In relation to redeployment, the Screening Panel Identified one (but only one) position for which he should be interviewed: the post of Head of Office (DSG) (Economic and Social). He attended that interview but was unsuccessful. He was notified of this outcome by Ms Zarinah Davies on 14th August 2014 and launched an appeal on 19th August²⁸.

76. It was presumably without great confidence in the success of his redeployment appeal (and in anticipation of the termination notice which was likely to follow) that Mr Akintade agreed in late August 2014 with his Director Mr Mkandawire that Mr Akintade would continue to work until 31st December 2014. This is confirmed by Mr Mkandawire’s email to Ms Davies of 29th August 2014²⁹. It appears that 31st December was a date beyond which employees becoming redundant as a result of the strategic review would not be expected to work in any event.

77. The redeployment appeal was dismissed by Mr Gary Dunn, DSG, in a letter dated 10th September 2014.³⁰

78. The termination notice duly followed in a letter³¹ from Ms Davies the following day (11th September 2014). The letter begins

“I write in reference to my letter of 14 August 2014. In that letter I informed you that we had not been able to successfully redeploy you under our Screening Panel procedure of the Sutherland Employee Handbook and therefore that constituted the end of the Screening Panel procedure and the Secretariat would be serving you with notice of compulsory redundancy in line with your terms and conditions of employment.

Redundancy notice

In line with Part Three, Section B, paragraph 20 of the Sutherland Handbook this letter serves as your formal notice of redundancy and you are entitled to 6 month’ [sic] notice. As discussed with your Interim Director, the Secretariat will not be requiring you to work all of your notice period as staff who are made redundant following the disestablishment of their posts are only required to work till 31 December 2014. Notice that is not worked would be paid in lieu.

The organisation and you have agreed that you will work till 31st December 2014 therefore your last day of service at Commonwealth Secretariat is confirmed as 31st December 2014...

²⁸ Annex XXIV to Application

²⁹ Annex I to Respondent’s Reply to Additional Statement

³⁰ Annex XXV to Application

³¹ Annex XXVI to application

The letter goes on to set out details of his redundancy payments and other entitlements and to deal with various formalities.

79. Whilst the letter does not refer to the specific power to dismiss on grounds of redundancy, such a power is conferred by Staff Regulation 16 which provides, so far as relevant:

The Secretary-General may terminate the employment of a staff member, giving reasons therefore [sic], if

(a) the needs of the service require abolition of the post or reduction in the staff...

80. Ms Lisa Graham, the investigator submitted her Report³² on Mr Akintade's grievances in October 2014.

81. Some of her findings were critical of the process followed in relation to Mr Akintade.

82. She finds, for example, that provisions of the Handbook had not been fully met, though she does not distinguish between contractual provisions and non-contractual guidance. She notes that Mr Akintade was not given notice of non-renewal of his contract expiring in January 2014 until after its expiry. She observes that the Secretariat did not "acknowledge" what she describes as the "automatic" consequential extension of his employment for six months under the Handbook. She also refers to a lack of "meaningful consultation and one to one consultation"³³

83. Ms Graham did not think it was "realistic" for Mr Akintade to expect to receive a third three year contract" and concluded that it was reasonable for the Secretariat not to have offered a further three-year contract³⁴. In addressing the overall question whether Mr Akintade's grievance was well founded she saw the issue as being whether the strategy for approved contract renewal took "legitimate precedence over the handbook"³⁵. She concludes that if this strategy has been "correctly constituted" (which she did not feel able to decide) "it appears that [Mr Akintade's] complaint is not established". As a non-lawyer she did not feel qualified to deal with "legitimate expectation"³⁶.

³² Appendix 27 to Application

³³ At para 5 on p24 of her Report

³⁴ Paras 1 and 2 on page 24

³⁵ Page 24 of the Report para 5

³⁶ Para 23 of her Report

84. Mr Gary Dunn, DSG, formally accepted and sought to summarise the findings of the investigator in a grievance outcome letter to Mr Akintade dated 14th November 2014³⁷.
85. On 28th November 2014 Mr Akintade wrote³⁸ by way of “final appeal” to the Secretary-General against Mr Dunn’s determination on the grievance.
86. On 18th December 2014 the Secretary -General (Mr Sharma) wrote³⁹ dismissing the appeal. The letter referred to Mr Akintade’s three “core” charges but responded in the round. The letter specifically rejected Mr Akintade’s contention that a legitimate expectation had been infringed. It also maintained that the Secretariat had complied with the Handbook. It expressed agreement with the findings of the investigator. It stated that the decision to renew contracts on a six month rolling period was based on the needs of the Secretariat.
87. Since we are about to analyse the Handbook and the legitimate expectation issue ourselves we see no purpose in comparing the respective analyses of the Investigator, the DSG and Secretary General or dissecting differences between them in emphasis or approach.
88. Mr Akintade’s employment duly ended on 31st December 2014.
89. He lodged his application (“the Application”) to the Tribunal on 16th February 2015.

Mr Akintade’s Claims

90. By his Application to the Tribunal Mr Akintade seeks to contest what he categorises as three decisions
- (1) The external investigator’s Report
 - (2) The DSG’s letter of 14th November 2014 accepting the Investigator’s findings
 - (3) The Secretary-General’s letter dated 18th December 2014 dismissing the appeal from the DSG’s letter of 14th November 2014.

³⁷ Annex 34 to Application

³⁸ Annex XXX to Application

³⁹ Annex XXXII to APPLICATION

91. In paragraph 7 of the Application he identifies specific aspects which he alleges to amount to breaches of his contract of employment. (His numbering has gone awry in that there is no (iv))

“(i) Failure to give the Applicant clear and substantive written reasons for decisions taken including abolition of post and decision not to renew a fixed term contract...

“(ii) Failure to give the Applicant advanced notice of likelihood of abolition of post /redundancy and lack of advanced notice of a decision not to renew a fixed term contract...

“(iii) Lack of equality of treatment accorded to the Applicant, including lack of equality of opportunity in respect of temporary reassignment of roles compared to others of equal grade in the same Section...

“(v) Failure of the Respondent to adhere strictly with the redeployment processes consultation requirements as set out in the Staff Handbook...

“(vi) Failure of the Respondent to comply with requirements in respect of tenure, granting of a new contract and contract renewal...

92. It is apparent from the full text of the Application, from the subsequent pleadings and from the correspondence that some of these headings are overlapping or closely interrelated (for example (ii) and (vi) above). Heading (v), however, appears to conflate redeployment and consultation issues which are really separate. Heading (iii) does not, on its face, relate to the decisions he seeks to impugn.

93. Each heading cross-refers to a substantial number of succeeding paragraphs, the substance in which does not always correlate with the heading. The Application as a whole contains a number of criticisms of the Respondent which cannot easily be traced either to the headings or to the decisions at issue.

94. For its part, in seeking to provide maximum assistance to the Tribunal, the Respondent has understandably dealt fully with criticisms advanced by Mr Akintade, even where they do not appear to arise from the decisions at issue.

95. In pointing out these difficulties we do not mean any disrespect to Mr Akintade. Though his correspondence is, of course, highly articulate and focussed, we recognise that the drafting of legal pleadings is inevitably challenging for a non-lawyer. Mr Akintade is not a lawyer and we make every allowance for that. We believe we have understood the substance of his complaints and contentions.

96. We should also make clear our gratitude to the Respondent's legal representative for the thoroughness of his pleadings

97. We will do our best to deal with the complaints we understand Mr Akintade to be making in so far as they fall within our jurisdiction, using the headings in paragraph 7 of the Application as our anchor. We will re-order the contentions for ease of exposition.

98. Before we address the substance of the case we will deal with Issues of jurisdiction and the application for disclosure

The Tribunal's jurisdiction and the implications for the present claims.

99. Under Article II of the the Tribunal's Statute the Tribunal's jurisdiction is limited. It can hear claims against the Secretariat by staff members for "non-observance"(breach) of their contract of employment. But it cannot, for example, entertain claims based on "maladministration" or "failure to observe best practice" if no breach of the contract of employment is thereby entailed.

100. Moreover, the Tribunal has no jurisdiction over complaints by Staff members against third parties who provide services to the Secretariat or against the Secretariat for the acts of those third parties.

101. Further Article II specifically prohibits consideration of a staff member's claim under a contract of service where internal remedies have not been exhausted. It also imposes time limits.

102. It is not in dispute that the Tribunal has jurisdiction over the challenge to Secretary-General's decision in his letter of 18th December 2014.

103. However it has no jurisdiction over the challenge to the investigator's report. This was a report provided by a third party, Ms Graham, to assist the Secretariat in the resolution of Mr Akintade's grievance. It was not itself an act or decision of the Secretariat and cannot entail any breach of contract by the Secretariat.

104. Nor does the Tribunal have jurisdiction over the decision of the DSG, Mr Dunn, in his letter dated 14th November 2014. This is undoubtedly a decision of the Secretariat but it is not the final decision. It is overridden or overtaken by the Secretary-General's decision in his letter of 18th December 2014, which is the final decision over

which the Tribunal does have jurisdiction. Moreover, taken separately, a challenge to the DSG's decision is also outside the Tribunal's jurisdiction on the ground that a further internal remedy was available (appeal to the Secretary-General) .

105. We do not think that Mr Akintade is disadvantaged by his inability to challenge the DSG's decision. It is the Secretary-General's decision which is effective and the Tribunal does have jurisdiction over that decision. Since the Secretary-General was entertaining an appeal from the DSG, the essential issues are in any event common to both decisions.

106. Focusing on the decision of the Secretary-General it is important to note however that the grievance with which he was concerned did not relate to all the matters which Mr Akintade now seeks to bring before the Tribunal: for example the Screening Panel or redeployment procedures . The Tribunal has jurisdiction over the Secretary-General's decision. That decision cannot be used as a means to complain about matters which were not the subject of that decision.

The application for disclosure

107. Mr Akintade seeks disclosure of a number of documents.

108. They are listed in his Application as

- (i) the letter from ASG Saibel to the Governor of the Reserve Bank of India on or about 1st August 2013;
- (ii) the list of work areas listed as still lacking clarity as of 17th July 2013 and 14th October 2013
- (iii) Note of Management Committee decision to limit service of non-redeployed professional staff to 31st December 2014
- (iv) Memo sent from Director , HR Division, requesting applicant's temporary re-assignment to trade Section – November or December 2003
- (v) Minutes of Screening Panel(s) convened, together with a list of all posts screened as well as criteria and scores applied, in assessing redeployment

options/possibilities for Applicant – between 20th March and 19th September 2014.

109. We do not consider any of these documents to be relevant or sufficiently relevant to the matters we have to decide to order disclosure. It is therefore not necessary for us to consider separately the Respondent's submissions as to the confidentiality of the documents in (v), though they would call for serious consideration if the threshold of relevance were met.

110. We remind ourselves that it is the Secretary-General's decision over which we have jurisdiction. It is difficult to see that any of the above documents have any real bearing on that decision.

111. The Secretary-General's decision did not relate, for example, to the Screening Panel's deliberations. In any event, we think that the nature and scale of the disclosure sought in (v) entails, to use the hackneyed phrase, a "fishing expedition" designed not to support an existing case (which is a proper purpose of seeking disclosure) but rather to explore the possibility of finding a new or different case (which is not in principle a proper purpose of seeking disclosure).

The substantive issues

112. We now address the substantive issues. We apply the principles of international administrative law.

113. We will not repeat our findings of fact above but will make additional findings as necessary to determine issues raised.

114. As indicated we will re-order the issues raised for ease of exposition.

(a) The Respondent's contractual obligations as regards the renewal or extension of Mr Akintade's fixed term contract.

115. Staff Rule 11 provides for appointments to higher grades to be made on a fixed term basis and that appointments to grades relevant to the present case are "subject to the Secretariat's Rotation policy".

116. The rotation policy is thus given contractual significance by the Rule. Infringement of the policy may therefore potentially entail a breach of the contract.

117. A key provision of the rotation policy is contained in para 4.3 which states that staff in the relevant grades “normally serve three three-year contracts”. The use of “normally” signals that there will be exceptions. This is subject to the clearly stated qualification in the first sentence of para 4.4:

“In all cases the granting of a new contract with these periods of tenure will be subject to...the needs of the Secretariat.”

118. If an employee’s post is likely to be deleted, the “needs of the Secretariat” do not require the granting of a new contract with three years’ tenure.

119. It follows that (subject to a notification issue which we consider separately below) the Secretariat was acting squarely within the policy in not granting a new three year contract to Mr Akintade as his post was being deleted. Subject to the notification issue (below) there is no question of any breach of contract in not offering a third three year term.

(b) Notification: Staff Rule 16

120. We have set out Staff Rule 16 above. It requires staff members on term contracts to be informed in writing “*whether they will be offered a new contract*”. Such information is to be given “*so far as practicable*”, “*not later than 6 months before the date of expiration of their contracts*”.

121. Pausing there the Secretariat did not provide such information before the expiry of Mr Akintade’s second-fixed term on 20th January. Even if it was not “practicable” to have provided a full 6 months’ notice (because of uncertainties about his post) there was still a breach of the primary obligation to notify him at some time in advance of expiry on 20th January 2014 whether a new contract would be offered. We think the clear sense of Staff Rule 16 is that it is not compliant to inform the employee after expiry, as occurred here.

122. It could not have been the case that the Secretariat was unaware until the moment of writing the letter of 20th January that Mr Akintade was to be offered a six month contract but not a three year contract.

123. If, as we infer, the Secretariat

- (i) thought it was likely that Mr Akintade's post would be disestablished
- (ii) did not wish to offer a full three year contract in these circumstances
- (iii) realised that the default position under Staff Rule 16 (see below) was that he would be entitled to a further six months employment in any event

the obvious course would have been to notify him that he would receive a six month contract (not a three year contract) whilst the review of posts was underway. This should have been done.

124. However Staff Rule 16 goes on to provide its own remedy in stating that where the information "has not been so given" the contract is automatically treated as extended for a period six calendar months after the date on which such notice was in fact given.

125. So the consequence of the failure to give advance notice was specified by the rules: a further six month's extension. This is exactly what Mr Akintade received. We do not think it matters whether the new contract is described as an extension or as a new contract offered on the previous terms (except as to duration)

126. It would no doubt have been better if the Secretariat had complied with the primary obligation by giving whatever advance notice it could give. Alternatively, if the obligation was to be breached, it would have been better, as Ms Graham pointed out, if the Secretariat had acknowledged its default and the effect of Staff Rule 16. It could have explained that the six months Mr Akintade was offered was a period to which he was entitled by virtue of the Secretariat's default. Indeed it could have reassured him in advance that this is how Staff Rule 16 would operate.

127. The Secretariat would no doubt say that it had flagged the point in Mr Saibel's global email of 17th July 2013. But this general communication to staff does not absolve the Secretariat from its obligation under Staff Rule 16 to notify Mr Akintade whether his own contract would be renewed; and it would have been courteous to reassure him personally that in the absence of notification of renewal he would receive a six month extension.

128. However Mr Akintade did receive, in the end ,the additional six month period to which Staff Rule 16 entitled him (and indeed a yet further six months employment pending the redeployment process) .

129. We do not consider that the bare failure to give advance notification sounds in compensation when the remedy provided by Staff Rule 16 itself (the further six months' employment) has been enjoyed.

(c) Legitimate Expectation

130. The *gravamen* of Mr Akintade's case on the failure to issue him with a third three year contract is based on "legitimate expectation". But the question whether there is any legitimate expectation (and if so what that legitimate expectation may be) is not free-standing. It is conditioned by the Secretariat's Rules and policies and the circumstances in which they are applied. It is therefore important first to construe the relevant Rules and policies as we have done above and then to consider the circumstances.

131. We can see no basis in the present case for saying that Mr Akintade had any legitimate expectation of receiving a further three year term. Under Staff Rule16 he had a right (by virtue of the absence of notification discussed above) to a further six months, which he received.

132. There is no basis in the Staff Rules for supposing that he would receive a three year extension. So far as policy is concerned the rotation policy is, as we have set out above, explicit in stating that the granting of further contracts with a three year tenure is subject to the needs of the Secretariat. It would be extraordinary if it were otherwise.

133. The case of **Oyas v Commonwealth Secretariat APL/16** can be distinguished. The circumstances of that case were unusual. The Applicant there was asserting an entitlement to a higher job than the one to which she had been appointed on the basis that she was already doing that higher job The Tribunal had granted her a temporary injunction to prevent the filling of that higher job. The Tribunal ultimately decided that she was not entitled to the higher role. In the meantime the fixed term applicable to the lower role to which she was appointed was to expire. Her existing role was to be subject to further consideration when the senior position was eventually filled but the work was still there. The Secretariat was far from having decided that her post

should be deleted. This represents a fundamental distinction between her case and Mr Akintade's.

134. The legitimate expectation recognised in **Oyas** arose from the particular circumstances of her case. It was consistent with the relevant Staff Rules and policies.

135. Here the claimed expectation is contradicted by the Rules and applicable policies, as we have explained above. We find that there was no such legitimate expectation here.

(d) Reasons

136. Mr Akintade challenges the termination notice as being inadequately reasoned.

137. Regulation 16 (a) empowers the Secretary-General to terminate employment "giving reasons therefore" if the needs of the service require abolition of the post or reduction in the staff.

138. It is true that the letter of 11th September 2014 itself provides little by way of reasoning. It does however refer to the redeployment process and Screening Panel decision. The background to that process was of course the disestablishment of the Applicant's post. The letter of 20th March 2014 explained this and referred back to the strategic plan. The discussion with Ms Davies and Mr Mkandawire on that day went into further detail about the restructuring.

139. We do not construe Regulation 16 as requiring reasons to be fully set out in the notice. The reasons may appear from a chain of correspondence and also from oral communications.

140. On this basis we consider that in the present case the reasons were sufficient to satisfy Regulation 16.

141. We would add that we do not think that Regulation 16 requires an account of why the post is being deleted, at least in a case such as the present where the whole area of activity in which the employee works (and not merely an employee's individual job) is being discontinued. The decision whether to operate in particular fields of activity is within the employer's authority and broad discretion under international

administrative law and we do not think it makes sense to read Regulation 16 as imposing a requirement to recount the basis of a commercial or policy decision.

142. Nor do we consider that there is any overriding principle of international administrative law which requires any greater detail in reasoning than that provided by Regulation 16. One of the authorities drawn to our attention by Mr Akintade in this context does raise a related but separate issue in relation to consultation which we address below.

143. We would not in any event have concluded that a dismissal is invalidated by a defect in setting out reasons for dismissal, at least where reasons demonstrably existed and the staff member had been made aware of them. But this point does not strictly arise.

(e) Consultation

144. Lack of consultation with Mr Akintade personally features as a relatively minor theme in Mr Akintade's Application, grievance and correspondence. This may be because he recognises that there was little he could say to affect his redundancy when his section was disappearing.

145. We have however been slightly troubled by the Respondent's stance on this. Their admitted approach (see Answer para121) was "*to inform as opposed to consult*".

146. It can be argued that in modern international administrative climate there may arise an implied contractual obligation to consult over potential redundancy.

147. The case of **F v International Monetary Fund IMF-2005-01** (drawn to our attention by Mr Akintade on the subject of "reasons") may illustrate such an emergent principle. This was a case in which the organisation was found to have breached reasonable procedures in failing to warn the employee of the abolition of his post in time to give the employee a reasonable opportunity to raise "relevant issues" (see esp paras 102 and 106 of the judgment). In contrast to the present case, **F v International Monetary Fund** did not concern a situation where a whole section or activity was closing. There was at least a potential question "as to who should go." Moreover, the employee had complaints of discrimination which might have been relevant to his being earmarked for dismissal.

148. The present case is at the other extreme. As we record above, Mr Akintade anticipated his redundancy notice as an inevitable formality once his section was “sun-setted”. This was a correct and fair perception. Whilst he would have appreciated the courtesy of an early explanation of the likelihood that he would receive a six month contract (and not a three year one) in January 2014 he had no legitimate expectation of any longer contract and there was no meaningful exchange he could have with management to preserve his job. The prescribed redeployment process was duly explained and followed after the deletion of his post.

149. Ultimately, therefore, we concluded that since on the facts of the present case there was nothing Mr Akintade could realistically say to influence the decision to make him redundant, the lack of personal consultation did not entail a breach of any possible legal duty. The Secretariat may, in future, want to consider the desirability of adopting a more personal approach. In cases where the individual can realistically influence relevant decisions about his or her future, a failure to give the employee an opportunity to do so may have legal significance.

(f) Inequality in not assigning to other roles

150. Under the rubric of inequality and discrimination, Mr Akintade seeks to compare his treatment with that of other employees who were, he says, temporarily assigned to other roles.

151. If and in so far so far as this complaint goes beyond the third “charge” in the Applicant’s grievance (relating to a failure to communicate information to Higher Officers of his Division) it was not strictly speaking, the subject of the Secretary General’s decision of 18th December 2014 and therefore falls outside our jurisdiction.

152. However, we do not think that the matters put forward by Mr Akintade raise a case to answer in any event. Discrimination is only unlawful if it occurs on some prohibited ground such as race or gender. No such prohibited ground is suggested. Moreover the bare facts put forward relating to the very different career histories of certain named individuals do not raise any serious basis for suggesting “unequal” treatment of any kind in any event and we have no reason to question the very full explanations given by the Respondent in paragraphs 25 -35 of its Reply to the Additional Statement.

(g) Restricting the voluntary redundancy scheme to administrative grades

153. Again, we do not consider that we have jurisdiction. This is not a “charge” raised in the grievance, and thus does not relate to the Secretary-General’s decision of 18th December 2014 which Mr Akintade seeks to impugn.
154. If we are wrong about this, we consider the complaint to be unfounded in any event. Mr Akintade relies (para 19 of his Application) on a provision on “Redundancy” in the (non-contractual) Guide in of the Handbook. He describes it as a Staff Rule but it is not.
155. The provision is contained in paragraph 11.1 of the Contracts section of the Guide. It states that where it is decided to cut posts there will first be a call for volunteers.
156. This provision provides guidance only and does not constrain the Secretariat to adopt a “one size fits all” approach. The Secretariat was entitled to take the view, reflected in the announced policy, that applications for voluntary redundancy in professional grades would be considered on a case by case basis, as their jobs were not readily interchangeable.
157. In any event, Mr Akintade did not wish to take voluntary redundancy. He wished to remain employed. We find this complaint difficult to understand.

(h) Redeployment

158. Redeployment was not the subject of the grievance and accordingly was not the subject of the Secretary-General’s decision of 18th December. We do not have jurisdiction in relation to this.
159. In any event, it seems to us that the Secretariat fully complied with the redeployment process.
160. Whether Mr Akintade was fitted to more than the one job for which he was interviewed is not a matter for us. We can also see nothing inappropriate in limiting consideration to “same grade or grade below” (as the Screening Panel procedure at Annex 11 to the Guide Expressly provides).

161. There is no substance in the complaint that there was a conflict of interest in the composition of the Screening and Grievance Panels. By the conclusion of the pleadings this appeared to boil down to the suggestion that because Ms Davies was involved (as Director of HR) in the grievance process she should not have sat also on the Screening Panel. The grievance was not however brought against Ms Davies personally. So, even leaving operational necessities aside, it is difficult to see why she should have stood down from the Screening Panel.

Conclusions

162. All the claims are dismissed.

163. The Secretariat did breach the contract by not giving Mr Akintade advance notice that he would not receive a third three-year contract. But the relevant Staff Rule provides its own remedy in ensuring that Mr Akintade enjoyed at least a further six months' employment, which he did.

164. The other complaints are unfounded and in some instances outside the Tribunal's jurisdiction.

Costs

165. Each party should bear its own costs.

Given on this 29 Day of April 2016 London

Christopher Jeans QC, President

Mr Chelva Rajah SC, member

Judge Sandra Mason, member