

IN THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF

MADONNA LYNCH

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal constituted by**Christopher Jeans QC, President; Justice Seymour Panton O.J, C.D, member and
Professor Epiphany Azinge SAN, member**

JUDGMENT

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Introduction and Overview

1. In July 2013 Madonna Lynch was acquitted of the two disciplinary charges which had been brought against her.
2. Although the Disciplinary Board found “*no evidence to substantiate either of the charges*” it made some criticisms of Ms Lynch in its report. She appealed to the Secretary-General.
3. Without awaiting the Secretary-General’s decision, she brought an Application to this Tribunal on 4th December 2013 (Application 23 Lynch v Commonwealth Secretariat “Application 23”)
4. On 18th December 2013 the Secretary-General upheld her appeal and criticisms were expunged.
5. Ms Lynch nonetheless continued to raise and pursue complaints about the disciplinary proceedings
6. In July 2014 this Tribunal dismissed Application 23 because Ms Lynch had brought it without exhausting internal remedies (since the appeal to the Secretary –General was pending when she lodged that Application).
7. On 6th August 2014 the Secretary-General decided on Ms Lynch’s continuing complaints which she was pursuing in relation to the grievance process. He awarded her compensation for procedural delay in the disciplinary process but dismissed other aspects of her claim.

8. On 8th December 2014 Ms Lynch lodged the two present Applications (Applications 30 and 31). Many allegations are common between the two Applications and there is a vast quantity of duplicated material.
9. Both Applications 30 and 31 are formally directed at the Secretary-General's decision of 6th August 2014 but, especially as regards Application 30, the connection between the Application and the decision attacked is limited.
10. In substance, Ms Lynch considers that the disciplinary proceedings should never have been brought. She considers herself to have been seriously wronged by the Secretariat and by many of the individuals involved. She wants this Tribunal to conduct its own investigation into the matter, to summon witnesses, order production of documents and award her compensation for what she contends are defects in the disciplinary investigation process.
11. The Respondent contends that the Tribunal does not have jurisdiction to undertake such an exercise, that the decision of 6th August 2014 is not relevant to many of Ms Lynch's contentions and that her criticisms of the process are in any event unfounded.

The facts

12. We will not repeat the history set out in the judgment in Application 24, which should be read with this judgment.
13. The allegations which would later form the subject of disciplinary charges were made against Ms Lynch in September 2012. They related to inappropriate language allegedly used by Ms Lynch in two conversations many months apart. As the Tribunal said in the judgment in Application 23, we do not think it necessary or appropriate to give further currency to the disciplinary allegations which were dismissed by repeating the detail of them.
14. Ms Lynch was required formally to respond to the allegations by letter dated 21st September 2012¹. The allegations were at that stage (and until further particularised

¹ In Annex 28 to Application 30

in June 2013) very briefly stated, summarising the alleged inappropriate remarks without identifying the accusers and providing little by way of context

15. She was distressed by the allegations. She was off work with related stress from 10th October 2012.
16. In late 2012 she raised complaints to Mr Banerji², Director of Political Affairs, and Ms Davies HR Director. A grievance process was launched. It is relevant to note that (as she was to confirm in an email to Ms Davies on 6th January 2013) Ms Lynch instigated *formal* grievance action on 3rd December 2012. An external consultant, Lisa Graham, was appointed by the Secretariat as investigator.
17. From late 2012 until summer 2013 grievance and disciplinary processes about the same events were running in tandem. Over the same period Ms Lynch was away sick with stress which appeared to be related to the allegations. She underwent assessments with the Secretariat's occupational health advisers who produced regular reports and letters of advice. The situation was clearly a difficult one for all concerned.
18. From an early stage, the medical advice from the occupational health team indicated the connection between her unfitness for work and the two allegations which were hanging over her. The conundrum was this. On the one hand she was unable to return to work because of stress associated with the unresolved allegations. On the other hand her absence from work naturally made the processes of dealing with those allegations (in the context of disciplinary and grievance processes) all the more difficult to progress.
19. The occupational medical advisers began to suggest that some form of return to work for the limited purpose of dealing with the allegations would be the best way forward. At first the suggestion was qualified and tentative. On 27th November 2012 Maggie Bream, Occupational Health Adviser, stated in an email³ to Human Resources

"Madonna remains very distressed about the issues at work which have caused her to be signed off work and is concerned that she has had no contact from the Secretariat..."

² See letter dated 1st November 2012 within Appendix 28 to Application 30

³ Within Annex 33 to Application 30 which contains a full file of the medical communications referred to in this judgment

Madonna is not fit to return to work in any capacity at the present time. In my opinion, and with the information I currently have, it would seem that if Madonna could have a meeting with all concerned to discuss the allegations against her it would greatly facilitate her return to work...”

20. By late February both Dr Shilling (report of 26th February 2013) and Ms Bream (email report of 28th February)⁴ were reporting uncritically Ms Lynch’s viewpoint that she did not feel able to return to work and move on until the allegations against her were clarified.

21. When she was requested to attend a disciplinary meeting in April 2013 Ms Bream and Dr Schilling reported this as a source of particular distress. Both they and Mr O’Connor Ms Lynch’s then legal adviser⁵ asked for the charges to be further particularised.

22. Ms Lynch attended a disciplinary hearing with her lawyer on 1st May 2013 but the hearing was aborted for procedural reasons.

23. On 8th May 2013 Ms Bream , reporting further, expressed herself directly:

“It is my opinion that she is unlikely to be able to return to work until the issues have been addressed and clarified”.

24. In May 2013 Ms Lynch’s pay was reduced by half under the sickness absence scheme. Ms Bream reported that this had increased her stress levels. On 29th May 2013 she reported that Ms Lynch remained very anxious and distressed.

Ms Bream records

“that she does not feel that she can return to work and perform well in her role while these allegations “*are still hanging over her*””

A similar message was conveyed on 10th June 2013.

25. On 21st June the Chair of the Disciplinary Board, Max Everest Phillips supplied further particularisation of the charges, essentially providing further details of the two alleged conversations (with quotations) which gave rise to the disciplinary charges , identifying

⁴ Both within Annex 33 to Application 30

⁵ Annex 15 to Application 30

the other persons involved and providing some context . There was a further day of hearing on 24th June. Ms Lynch regarded the particularisation as insufficient and on 25th June she pressed⁶ for disclosure of witness statements.

26. However, the Disciplinary Board then reached a conclusion that the allegations were not substantiated.

27. On 5th July Mr Everest Philips wrote to Ms Lynch notifying her (emphasis original) :

“...The ASG has accepted the [Disciplinary] Board’s findings that the allegations were not substantiated and therefore that the allegations be dismissed.

There are a number of recommendations made by the Board for subsequent follow-up action and these will be conveyed to the relevant parties, including yourself. in due course”

28. The “follow-up action” recommended in respect of Ms Lynch was an “official reminder” that “inappropriate or inconsiderate behaviour will not be tolerated” reflecting the Board’s view that there was circumstantial evidence that her behaviour at work “on occasion did not reflect well on her”⁷.

29. Meanwhile, grievance investigations had progressed. The exact course of the grievance investigations is far from clear from the pleadings and materials provided. Whilst we have transcripts⁸ of investigation meetings between the investigator and various witnesses in January and February 2013, we do not have (amongst the vast array of materials in the Annexes to the pleadings) either the interim Report apparently issued by the investigator, Miss Graham in March 2013 or a subsequent final Report. It is apparent from the Secretary-General’s ultimate decision of 6th August 2014 (below) however that Ms Graham’s final grievance Report rejected Ms Lynch’s allegations of bullying, harassment, discrimination, dereliction of duty and abuse of power.

30. On 24th July 2013 Ms Lynch obtained a copy of the Disciplinary Board’s report from the ASG’s office. This led her to make further requests for the statements of witnesses, despite the fact that the disciplinary proceedings were now over.

⁶ Annex 27 to Application 30

⁷ Report at Annex 22 to Application 30

⁸ Annex 2 to Answer in Application 31

31. Reading the report must also have brought to her attention, if she was not already aware of it, the follow-up action recommended by the Board and the criticism it contained of her conduct.
32. On 8th August 2013 she submitted, in the form of an appeal, a challenge to the criticisms made of her in the Disciplinary Board report. She also asked for the Report to be expunged, her personnel file suitably corrected and payment of her legal costs. She further sought damages or compensation, an apology and disciplinary action against Zarinah Davies.
33. Ms Lynch lodged Application 24 to the Tribunal on 4th December 2013 even though the Secretariat had made it clear that consideration of her appeal was in hand: see, for detail, paragraphs 17 and 18 of the Tribunal's Decision in Application 23. The Tribunal was later to decline jurisdiction over that application because she had not exhausted the internal remedy.
34. On 18th December 2013 the Secretary-General issued his decision in respect of Ms Lynch's appeal against the Disciplinary Board's criticisms of her. The Secretary-General made it clear that he was dealing with the matter as an appeal under paragraph 17 Annex 1 of the Staff Handbook (the disciplinary rules and procedures). He upheld the appeal. He ruled that the Board's recommendation had amounted to a reprimand and that no such reprimand ought to have been issued when the charges were dismissed. He further directed that the offending recommendation be removed from the Report, that the personnel record be annotated to reflect the finding that Ms Lynch was not culpable and was not subjected to a penalty and that Ms Lynch be reimbursed her legal costs. In other respects (ie as to damages, apologies and disciplinary action against Ms Davies) the appeal was dismissed;
35. This was, by any standards a handsome victory for Ms Lynch. The Secretary-General did not award damages, require apologies or institute disciplinary action; but Ms Lynch's attack on the Disciplinary Board's criticisms of her had been thoroughly vindicated.
36. In any event, Ms Lynch has not challenged any aspect of the Secretary-General's December 2013 decision in any subsequent Application to the Tribunal.

37. But she remained aggrieved that she has been subjected to the disciplinary process. The precise course of the grievance investigations, conclusions and notifications between March 2013 and June 2014 is not clear from our papers. It is clear that she was not satisfied with Ms Graham's conclusions because she submitted to the Secretary-General on 11th July 2014⁹ what she described as a "substantive appeal" against the "Lisa Graham Investigation". We put the words "substantive appeal" in quotation marks because there is a question as to whether it is properly described as an "appeal", even though the Secretary-General so describes it. We return to this below.
38. In this "substantive appeal" she said that Ms Graham's Report was based on errors of law and fact. Her complaints were many. They included allegations that critical annexes had been omitted from a version of the report given to her; that she should have been informed of the March 2013 Interim report; that there should have been an informal stage to the grievance; that there had been delay. She levelled criticisms against the role played by Shelley Spillane, Acting Director, suggesting a conflict of interest on her part and accusing Ms Spillane of failing to explain the disciplinary allegations when made. She alleged bad faith and a lack of independence against Ms Graham because she had taken legal advice from the Secretariat's legal adviser. She made points about the witness evidence given to Ms Graham. She claimed to have been, through the disciplinary process, the victim of harassment bullying, discrimination and unequal treatment. She said her health had been damaged by the Secretariat's handling of the allegations against her and she had suffered a loss of salary through being on half-pay. She said she had incurred expenses because she had been forced to withdraw from a degree program.
39. We would observe at this stage that the "substantive appeal" clearly conflates questions about the grievance process with criticisms of the original disciplinary action.
40. Following her appeal Ms Lynch says that she obtained further documents from an anonymous whistle-blower. These were statements supplied by witnesses in the investigations, including one¹⁰ from her manager Mr Kasiry to the Disciplinary Panel which expressed scepticism about the allegations against Ms Lynch and concerns

⁹ Annex4 to Application 31

¹⁰ Annex 9 to Application 31

about the disciplinary process and was generally supportive of Ms Lynch. On 25th July she wrote to the Secretary-General drawing attention to this further evidence.

41. The Secretary General issued a decision in relation to her appeal on 8th August 2014. It is this decision which (at least formally speaking) is challenged in the present Applications.

42. The Secretary-General upheld one aspect of her “substantive appeal”. He noted the investigator’s finding that (disciplinary) process delays had contributed to her ill-health (albeit Ms Graham also thought that Ms Lynch had contributed through not engaging in initial fact-finding with her managers). He made a financial award as follows:

“In view of the findings of the investigator on the delays, I approve the reimbursement of the salary deducted from you in the sum of £1,522.24 plus interest during the period of your sick leave. I am also willing to consider a refund of university tuition fees ...you may have incurred if you submit appropriate documentation in support of this”.

43. He dismissed the remainder of the appeal, giving reasons on some particular issues to which we return. He noted that the Secretariat would not be reopening proceedings of the Disciplinary Board or issues directly or indirectly addressed in the disciplinary proceedings. We will return to this also.

The Applications

44. As we have noted, Ms Lynch lodged two separate Applications (Applications 30 and 31) on the same day, 8th December 2014. The Applications naturally relate a common history. The “Explanatory Statements” in the two applications are extremely similar. They attach many of the same documents in the Annexes and there has been vast duplication.

45. Application 30 seeks a series of procedural orders which she sets out in the pleas: disclosure of interview records, verification of statements, an oral hearing with specified individuals as witnesses, including

(i) Mr Dunne the Secretary to the Disciplinary Board “*to defend the Board’s report*”

- (ii) Ms Davies the HR Director *“to explain why she did not ensure that the allegations put to me, was not (sic) in accord with those of the complainant”*
- (iii) Mr Kasirye *“to explain exactly what Spillane initially told him were the allegations and whether Spillane described and/or explained the allegations in any way to me”*
- (iv) Ms Kremer, Political Affairs Officer *“to ascertain what transpired when she approached the Disciplinary Board with key evidence”*

46. Her pleas continue with a request “where the Tribunal finds my case is upheld” to Expunge the Disciplinary Board’s Report, inform individuals of the judgment and order compensation.

47. Application 30 can be described as an invitation to this Tribunal to investigate the disciplinary allegations and processes

48. Application 31 is similar but the pleas are in part directed additionally to Ms Graham’s investigation. The Tribunal is invited to call her as a witness at an oral hearing and to award damages and other remedies in relation to “the Graham investigation”.

The Tribunal’s jurisdiction

49. Article II(3) of the Tribunal’s Statute provides that the Tribunal has relevant jurisdiction to hear and determine any application by a member of staff which alleges

“ the non-observance of a contract of employment or terms of employment of such member of staff.”

Article II(5) states that “contract of employment” and “terms of appointment” include

“all relevant Regulations and Rules in force at the time of the alleged non-observance and include the rules relating to staff gratuity, retirement and end of contract benefits”.

50. The starting point therefore is that the Tribunal's jurisdiction in relation to staff claims is limited to breach of contract. The Tribunal does not have any general supervisory jurisdiction over the Secretariat, even as regards relations with staff, except where compliance with the contract is at issue.
51. The Tribunal's powers are particularly limited in the field of disciplinary action. As the Respondent points out in its Answer to application 30 this is the result both of general principles of international administrative law and the Disciplinary Rules of the Secretariat.
52. The principles of international administrative law prohibit an Administrative Tribunal from substituting its own judgment or assessment for that of management: See Amerasinghe: *Principles of the Institutional Law of International Organisations* [2005] P301
53. The Disciplinary Rules of the Secretariat (set out in Annex 1 to the Staff Rules in the Handbook) provide at paragraph 17 that the Secretary –General's decision on appeal in a disciplinary case is "final".
54. Even within these constraints the Tribunal can intervene where there has been, in the legal sense, an "abuse of power" because this will normally entail a breach of contract. But the scope for intervention is very limited. It certainly does not extend to "re-trying" disciplinary cases on their facts or examining questions of best practice in the conduct of disciplinary investigations.
55. Similarly in relation to grievances, the Tribunal does not have any general jurisdiction to investigate grievances, still less to make its own findings of fact about the substance of a grievance or to adjudicate on best practice in the conduct of grievances.
56. Moreover if a legal challenge is to be launched in relation to a grievance it must engage with the question whether the action or decision of the Secretariat entails a breach of contract.
57. Additionally, any Application to the Tribunal must be directed against the action or decision which entails the relevant breach. Under Article I(3) of the Statute it must be filed within 90 days of the relevant event.

Jurisdictional Objections to the current Applications

Application 30-jurisdiction

58. Application 30 is essentially an invitation to the Tribunal to conduct its own investigation into the disciplinary complaints, to summon witnesses about the facts and reach its own conclusions about the matters raised. The Tribunal has no power to do this for the reasons set out above.
59. The conduct of the disciplinary investigations was a matter for the Secretariat. No breach of contract has been identified.
60. There are clearly aspects of best practice which human resources specialists might debate in the history of the present case: for example the degree of particularisation to be expected in laying out disciplinary charges. In a case where the allegations against the employee are then dismissed as being unsupported by evidence, however, it is difficult to see how any conceivable breach of contract arises.
61. Moreover the Secretary-General reached a decision on appeal on 18th December 2013 which was deemed to be final under the rules. His conclusion was highly favourable to Ms Lynch and involved the removal of the critical recommendation from the disciplinary Board Report and payment of Ms Lynch's costs. It could not possibly be said to amount to an abuse of power against her.
62. Furthermore, Ms Lynch did not and does not seek to attack that decision, within the 90 day time limit or otherwise. She cannot use the Secretary-General's later (6th August 2014) decision about the grievance process as an opportunity to impugn the earlier and final decision he made on the disciplinary process and the remedies she sought within that process.

Application 31

63. In so far as Application 31 repeats the invitation to the Tribunal to re-try disciplinary issues or impugn the disciplinary decision which became "final" with the Secretary –

General's decision on appeal in December 2013, it suffers from the same jurisdictional defects as Application 30.

64. It is reasonably clear however, not least from the explanatory statement, that elements of Application 31 are directed at the decision made by the Secretary-General about the grievance aspect on 6th August 2014.
65. (Ms Lynch and the Secretary-General referred to it as an "appeal". We refer to it as a decision because it does not appear to us that there was any earlier decision, at least of the Secretariat itself, against which she was appealing. She was merely challenging aspects of the grievance process and the views of the external investigator. But little turns on this).
66. It is the Secretary General's decision of 6th August 2014 which the Application formally challenges and (given the Tribunal's practices in relation to the counting of time) there is no suggestion that the Application was brought outside the 90 day time limit.
67. It does not follow however, that we have jurisdiction to consider all the allegations she makes in Application 31. We certainly have no power to conduct our own investigation into the facts so as to reach our own conclusions on the substance of her complaints, for example by calling witnesses as Ms Lynch suggests. It is not for us to decide for example the Applicant's questions: "*Did Shennia Spillane explain the allegations to me?*" "*whether Spillane fabricated the allegations*" or "*Did I cause my own predicament?*" Nor do we have power to investigate questions of whether best practice was followed in the conduct of the investigation. Our jurisdiction is confined to questions of breach of contract.
68. Furthermore since the focus must be on the Secretary-General's decision of 6th August 2014, criticism Ms Lynch makes of the judgment of the practices and assessments of the independent investigator Ms Graham do not in themselves raise a case that the Secretary-General reached any unlawful conclusions in not taking the actions which Ms Lynch would have liked him to take. For example, questioning the good faith of Miss Graham (para 52 of her Explanatory Note) does not bring the Secretary General's good faith into question.

69. However we conclude that there are two strands to her case which are sufficiently within the realms of contractual obligation to merit examination as a matter of substance. Each of these points was in her so-called “appeal” to the Secretary General on the grievances and are amongst the points he rejected in his 6th August 2014 decision:

- (i) Her complaint that, contrary to procedures no informal action was carried out before the formal grievance process was started
- (ii) Her complaint that she was legally entitled to the disclosure of Miss Graham’s interim Report
 - (i) Ms Lynch’s complaint that no informal action was carried out before the formal grievance process was started –substance

70. It is correct to observe that both the Grievance procedure applicable to deal with “contract and Administrative Grievances” (Annex 2 to the Staff Rules) and the procedure for dealing with “Harassment Cases (Annex 3) provide for an informal stage before formal action begins. It is not suggested that such a stage was observed.

71. However, as we have found above, it was Ms Lynch in this case who initiated “formal” action in December 2012 as her email of 6th January to Ms Davies confirms. Where an employee chooses to progress the matter to the formal stage without going through the informal stage and the employer does not object, there is no possible breach of procedure, let alone breach of contract, by either party.

72. The Secretary-General relied on the same communications in his decision of 6th August 2014. He was plainly entitled to conclude that the absence of an informal stage did not in this case amount to a procedural irregularity.

- (ii) Ms Lynch’s complaint that she was legally entitled to disclosure of an interim Grievance Report

73. In Addo v Commonwealth Secretariat CSAT Apl/21 this Tribunal decided that an employee is entitled to know the outcome of his or her grievance, but that this did not

necessarily entail the Secretariat disclosing the final report. There is all the less reason why an interim report has to be disclosed

74. There is no suggestion here that Ms Lynch did not know the outcome of the grievance. She had, in any event, no legal entitlement to any interim report.

75. The Secretary General acted lawfully and in accordance with the contract in rejecting this aspect of the complaint.

Bad faith

76. In case it is necessary for us formally to deal with this question, we find that there was no evidence of bad faith in relation to the decision of the Secretary-General which is attacked.

Conclusions and Costs.

77. It follows that we dismiss all Ms Lynch's claims in both Applications.

78. The Respondent applies for costs.

79. It is fair to say that the bulk of Ms Lynch's claims proceed from misconceptions about the nature and scope of the Tribunal's jurisdiction but we recognise that she is acting in person.

80. It is also unusual that an employee acquitted of disciplinary charges by the disciplinary panel, fully exonerated of criticism on appeal and awarded compensation for financial loss should be so relentless in seeking further relief; but we recognise that she feels very strongly that she should never have been put through the disciplinary process.

81. We are bound to observe, nonetheless, that Ms Lynch's approach to litigating in this Tribunal has been wanting in good order, proportionality or restraint. The contemporaneous presentation of two separate claims (with much duplication) is one feature of this.

82. Having regard to the whole history of the matter and the fact that Ms Lynch was acting in person, we have concluded, on balance, that we should not award costs on this occasion.

83. Each party will therefore bear their own costs.

Given this 18th day of December, 2015.

Christopher Jeans QC, President

Judge Seymour Panton O.J, C.D.,
member

Professor Epiphany Azing SAN,
member