CSAT APL/36

IN THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF:

(1) EFE OTOTAHOR
(2) GIZELA ERASMUS
(3) OLUSOLA AINA

Applicants

AND

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Review Board constituted by
Mr. Justice Seymour Panton OJ,CD;
Mr. Justice George Erotocritou;
Justice Sandra Mason QC;
Professor Epiphany Azinge SAN and
Mr. Chelva Rajah SC

JUDGMENT ON APPLICATION FOR REVIEW

JUDGMENT

1. All three Applicants joined the service of the Respondent about the same time in 2011 as HR Assistants. They have very similar job histories. Their claims are virtually identical, based on similar facts and raised similar questions of law. So are the Respondent's defences. The Tribunal therefore consolidated and tried their cases together.

The Original Applications

2. In their original applications (the "Original Applications") all filed on the same date and on their behalf by the same law firm, the Applicants had sought the following remedies in relation to their contracts of employment:-

   (i) specific performance of the obligation to pay the Applicant's gratuity (the "Gratuity Claim");
   (ii) specific performance of the obligation to implement the Job Evaluation to re-grade the Applicant's job to Pay point K from Pay point N, and the consequent increase in remuneration (the "Job Evaluation Claim");
   (iii) alternatively, compensation, to be assessed, for the Respondent's failures to implement the obligations at (i) and/or (ii) above;
   (iv) interest thereupon to be assessed; and
   (v) costs, to be assessed.

3. The Applicants also claimed that the Respondent had breached its duty under the Respondent's Grievance procedure rules to ensure that action was duly taken on their complaints, no substantive response thereto having been received by them from the Respondent. The Applicants, however, made no claim for damages or other specific relief for this alleged breach and said they would forgo this complaint upon due resolution of the Gratuity Claim and the Job Evaluation Claim.

Summary of Parties' respective positions

The Applicants

4. For the Gratuity Claim, the Applicants rely principally on their letters of appointment dated 13 June 2011, 7 June 2011 and 7 July 2011 respectively and also on the relevant Staff Rules as contained in the Respondent's Human Resource Handbook.

5. For the Job Evaluation Claim, the Applicants say they were entitled to be upgraded in their posts and the consequent increase in their salaries following the results of a job evaluation carried out by Price WaterHouseCoopers (PWC) in December 2011 and as evidenced by the attached document (the "Attached Document") to Marilyn Benjamin's email to "ALLSTAFF" dated 15 June 2012 referring to various job positions (the "ALLSTAFF email").

6. The Applicants cite in further support of the legitimacy of their claims the case of other members of CSAT staff in a similar situation to theirs.

The Respondent

7. For its part the Respondent asserts that:-

   (i) Although the Applicants' initial "fixed term contracts" included the option of a pension or gratuity, this was an error. None of the contracts subsequently given to the Applicants (including the last contract ending on 31 December 2013) contained a pension or gratuity entitlement provision. This was because paragraph 50 of the Staff Rules as set out in Section E of the Respondent's Human Resource Book, on which the Applicants rely, had been amended in April 2006 (Annex 1 of Answer) to exclude temporary staff (which

is what the Applicants were) from entitlement to pension and gratuity benefits.

(ii) Because the initial contract included, albeit erroneously, a provision for gratuity or pension was honoured at the end of that contract. No question of any payment of gratuity or pension arose for the subsequent contracts as the error had been corrected.

(iii) The limited job evaluation exercise conducted by PWC re-graded the post of Human Resources Assistant from (a lower) pay point N to (a higher) pay point K. The re-graded position was substantially different from that which the Applicants occupied and had different responsibilities, job experience and qualification requirements. (See paragraphs. 25 and 26 of the Answer in the Original Applications).

(iv) The Applications are not receivable on the ground that the Applicants had not exhausted the internal remedies within the Commonwealth Secretariat as required by the Statute. The joint memoranda dated 16 January 2013 and 3 July 2013 addressed to the HR Director by the Applicants did not constitute the initiation of a formal grievance.

The Tribunal's Judgments

8. The Tribunal delivered judgment on 25 March 2015 (the "1st Judgment"). In that judgment the Tribunal found that the Applications were receivable but dismissed all of the Applicants' claims except one, the Job Evaluation Claim.

9. In support of the Job Evaluation Claim, the Applicants had relied on the Attached Document. The Applicants had each claimed in the Applications

that their jobs were among those that were listed in the Attached Document and that these jobs had been re-graded from pay point N to pay point K.

10. However, the document that the Applicants had filed with their Applications as being the Attached Document turned out, as the Tribunal found out and the parties subsequently conceded, to be not the actual Attached Document. The Tribunal accordingly reserved judgment on the Job Evaluation Claim pending the production to it by the Respondent of the actual Attached Document.

11. Following production of the Actual Document by the Respondent and after considering the same and the further submissions made by the parties, which included the following:-

    (i) Respondent's Additional Submissions on Job Evaluation filed on 9 April 2015;
    (ii) Applicants' Response to (i) above filed on 17 April 2015; and
    (iii) Respondent's submissions on (ii) above;

    the Tribunal delivered a second judgment on 27 May 2015 (the "2nd Judgment") dismissing the Applicants' Job Evaluation Claim.

The Review Application

12. It is this 2nd Judgment that the Applicants are challenging by their "Application to Review Judgment CSAT 24, 25 & 26 in accordance with Article X1 of the CSAT Statute" (the "Review Application").

13. Having received and considered the Review Application and the parties' submissions made pursuant to the President's directions of 26 November 2015, the President issued further Directions constituting a Review Board in accordance with Article X1 paragraph 8 of the CSAT Statute to review the 2nd Judgment. The Review Board comprises

1. Mr. Justice Seymour Panton OJ, CD;
2. Mr. Justice George Erotocritou;
3. Justice Sandra Mason QC;
4. Professor Epiphany Azinge SAN; and
5. Mr. Chelva Rajah SC.

14. The President also issued directions for the parties to file the following submissions in relation to the Review Application which the parties duly complied with:-

(i) Respondent's Response (to the Review Application) filed on 15 October 2015; and

(ii) Applicants' Response (to (i) above) filed on 23 November 2015.

15. Having considered all the relevant documents and submissions the Review Board sets out its findings and determinations below.

The Review Board's Findings and Determinations

16. The Applicants set out two grounds for seeking a review in paragraph 2 of their Review Application**,** namely:-

"1. The Tribunal erred in law and fact in its findings relating to the propriety of the 2009 Job Evaluation (the "1st Ground"); and
2. The Tribunal erred in law regarding the Respondent's duty of good faith by not ensuring the Applicants were not disadvantaged by the non-implementation of the job evaluation and payment of back pay … (the "2nd Ground")".

The 1st Ground

17. The nature of the Job Evaluation Claim is set out as follow**s** in paragraphs 8 to 13 of the 2nd Judgment:-

"8. The Applicants were employed from various dates in the summer of 2011. They were employed as HR Assistants. They were initially employed on one year contracts. Their employment was continued thereafter on a succession of contracts (sometimes described as "contract extensions") for various short terms.

9. Under the (one year) contracts under which they were originally engaged and under the successive short term contracts the job was assigned the grade of "N". There was no ambiguity about the grade which each of the Applicants was being offered. It was at all times grade N.

10. As appears from paragraphs 29-31 of the [1st Judgment] the Applicants had inquired before the expiry of one contract whether, under the next contract, the job would be upgraded to grade K. The Respondent had told them it would remain at N.

11. In support of their present claim that they were entitled to be upgraded to "K", the Claimants relied on the email to "ALLSTAFF" from Marilyn Benjamin dated 15th June 2012 ("the ALLSTAFF email"). This forms Annex XI to all three of the Applications. The memo appeared to promise the implementation of recommendations for re-gradings which had been set out in a 2009 Job Evaluation. Moreover it appeared to promise back pay to 1st July 2011 for those whose jobs were to be upgraded.

12. We set out here the key paragraphs of the ALLSTAFF email (emphasis added):

"As many of you will know, a limited Job Evaluation was undertaken for the Commonwealth Secretariat by PricewaterhouseCoopers (PwC) Consultants in 2009. Management

Committee has progressively considered the recommendations of the report.

In this regard, I can advise that the Management Committee has now made decisions on all the remaining recommendations of that 2009 Job Evaluation, affecting the positions listed **in the attached document.** The Management Committee has decided, exceptionally, **to backdate the implementation date of these decisions to 1 July 2011** to coincide with the recent TACOS package of reforms. CSD will effect these changes in the payroll as soon as possible …

… It is recognized that the implementation of the outcomes of the 2009 only addresses the limited roles considered and that in some cases, this may generate new challenges which we may need to manage as they arise.

Going forward … we will need to consider any organisation-wide analysis of roles and job evaluation exercise. In the meantime, Management Committee does not expect to receive any individual requests to re-evaluate existing positions …"

13. Paragraph 19 of the respective Applications stated that the "*annex to the email identified the Applicant's job as a move from Pay point N to pay point K (Annex XXll)"*. "

18. The Applicants' original case before the Tribunal was that the Attached Document showed that their jobs of "HR Assistant" had been re-graded from Pay Point N to Pay Point K.

19. However, when the actual Original Document was produced, both parties agreed as follows:-

(a) the Applicants' job of "HR Assistant" was not referred to in the Attached Document;

(b) although there are 2 jobs in the Attached Document which include the title "HR Assistant", these were roles occupied by permanent staff members and do not correspond to the Applicants' job;

(c) there are various jobs in the Attached Document which include the title "HR Officer". These were vacant posts.

(See paragraphs 21 to 25 of the 2nd Judgment)

20. The Applicants could now no longer maintain their original claim that the Attached Document provided for their job to be moved up to pay point K. They therefore contended instead that they were in fact performing the role and functions of the "HR Officer (HQ Resourcing)" job referred to in the Attached Document and were therefore entitled to be paid at pay point K. The Respondent disputed this.

21. The Tribunal dismissed the Job Evaluation Claim and found as follows as set out in the 2nd Judgment.

"41. It Is extremely difficult for the Tribunal to resolve questions as to the extent to which tasks undertaken by the Applicants could be said to involve work above the HR Assistant level.

…

51. Even if, however, the Claimants did in fact regularly undertake tasks which:-

(a) were at a higher level than their own job as HR Assistants; and

(b) were tasks (which) would have fallen to the HR Officers (HQ Resourcing) if those positions had been filled;

it does not follow that the [Applicants] are to be treated as holding those other HR Officers (HQ Resourcing) jobs or that a grade

announced specifically as being for the HR Officer (HQ Resourcing) jobs then became applicable to the HR Assistant job.

…

53. In short the Applicants' experience, performance and high qualification may have made them strong candidates for the three HR (HQ Resourcing) Officer (sic) posts when advertised; but did not mean that they had already been appointed to these posts or that they were entitled to have their existing position re-graded at the level of those posts.

…

55. In the light of this conclusion, the various heads of argument advanced by the Applicants can be answered shortly. The Applicants' re-grading/job evaluation claim falls at the first hurdle. There was no relevant "failure" to implement a grade K. The Applicants had never been promised such a grading or given to understand that it would be applicable; and the Respondent was entitled to maintain their existing grade. It follows that the various strands of the Applicants' argument lack the necessary foundation on the facts."

Grounds for Review of a Judgment

22. Article X1.5 of the CSAT Statute sets out the grounds on which a party to proceedings before CSAT can seek review of a CSAT judgment. It provides that a party who challenges a CSAT judgment on the ground that the Tribunal

(a) has exceeded or failed to exercise its jurisdiction or competence; or

(b) has erred on a question of fact or law or both, which has resulted in a failure of justice;

(c) 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.

The 1st Ground

23. The 1st Ground is that the Tribunal erred in law and in fact in its findings relating to the propriety of the 2009 Job Evaluation. But what is the relevant error of law and/or fact in question?

24. None of the findings of fact or legal propositions applied by the Tribunal as set out in paragraph 21 above which form the bedrock for the Tribunal's dismissal of the Job Evaluation Claim have been challenged.

25. Instead the Applicants' case for the 1st Ground appears to be based on the assertion that there was a typographical error in the Attached Document. The term "HR Officer" was meant to read "HR Assistant". This is because there was no reference to HR Officer in the PWC Report, only to an HR Assistant.

26. This is a new argument raised by the Applicants i.e. an argument not raised by them before the Tribunal below. There is therefore, unsurprisingly, no finding of fact made or proposition of law applied by the Tribunal in relation thereto. The Review Board cannot therefore find that there has been any error of law or fact by the Tribunal in such regard. The 1st Ground for Review fails for this reason alone.

27. The Review Board also finds that having agreed before the Tribunal that the Attached Document did not refer to the Applicants' job, it lies ill in the mouths of the Applicants to raise the typographical error argument before the Review Board. This argument is tantamount to saying that the Applicants' job was in fact referred to in the Attached Document and that the Review Board must correct the typographical error and the Attached Document be read as referring to the Applicants' job. But before the

Tribunal below, the Applicants had agreed that the Attached Document did not refer to the Applicants' job.

28. The typographical error argument also contradicts the Applicants' argument before the Tribunal that though the HR Officer (HQ Resourcing) job did not refer to the Applicants' job**,** they were in fact carrying out the duties and function of an HR Officer (HQ Resourcing) and should be remunerated accordingly. If there was indeed a typographical error, the Applicants should have been arguing instead that the HR Officer (HR Resourcing) job did in fact refer to the Applicants' job.

29. The Review Board finds little merit in the 1st Ground and dismisses it.

The 2nd Ground

30. This ground is based on the Tribunal making an error of law regarding the Respondent's duty of good faith which required the Respondent to ensure that the Applicants were not disadvantaged by the non-implementation of the job evaluation and payment of back pay.

31. The Tribunal found, and in the Review Board's view quite rightly so, that the PWC job evaluation report did not re-grade the Applicants' job from pay point N to pay point K. No questions therefore arose of any duty on the part of the Respondent, whether of good faith or otherwise, to re-grade the Applicants' job to pay point K or of back pay arising.

32. However, from paragraph 16 of the Review Application, their claim of breach of duty of good faith appears to relate not so much to "non-implementation of the job evaluation and payment of back pay as to their claim that "the Respondent failed to disclose to the Tribunal the fact that the Respondent made an offer by email dated 14 March 2014, which stated "without prejudice", an offer of £15,000 per applicant, plus legal fees, as an ex gratia payment made in good faith etc." The email further stated that the offer would be "subject to the approval of the Secretary-General".

33. The Applicants each accepted the offer and communicated this to the Respondent on 17 March 2014. The Applicants were then informed on 26 March 2014 that the Secretary-General did not approve the offer. The dispute was accordingly not settled and proceeded to the Tribunal for determination.

34. This argument relating to the "failure to disclose" the without prejudice offer was also not raised before the Tribunal. The Tribunal therefore did not apply any proposition of law in relation to the matter. There is therefore no error of law for the Tribunal to review under the 2nd Ground. On this ground alone, the application for review on the 2nd Ground must be dismissed.

35. But even if it had been raised before the Tribunal, the offer made was both "without prejudice" and conditional. The condition was that the Secretary-General had to approve it. In the event, he did not. The offer therefore "failed" as the condition on which it hinged did not come to pass. The fact that the Applicants had purported to accept the offer before the Secretary-General had approved it is neither here nor there.

36. As the offer was made "without prejudice", it would have been wrong for either party to have disclose the fact it was made to the Tribunal unless they both agreed to waive privilege. There is no evidence before the Tribunal that there was such agreement.

37. It was therefore right that the Respondent did not disclose to the Tribunal the fact that the offer had been made. Even if the Applicants wished to disclose it (and there is no evidence before the Review Board in this regard) the Respondent was entitled to refuse to waive privilege and object to it being disclosed. That is both the point and effect of "without prejudice" offers.

38. The Review Board finds little merit in the 2nd Ground and dismisses it.

Costs

39. The Tribunal has found little merit in either Ground on which the Applicants have brought their Review Application. The Review Board notes that to date costs have not been ordered against a party who has been unsuccessful in a Review but we see no reason why the Review Board should continue to apply this practice where there is little or no merit in the Review Application. As the Review Board has expressed this view for the first time, each party is ordered to bear its own costs in this Review.

Dated the 25th day of May 2016.

Signed:

Justice Seymour Panton OJ, CD
member

Justice George Eotocritou
member

Justice Sanda Mason QC member
member

Professor Epiphany Azinge SAN
member

Mr Chelva Rajah
(Presiding Member)