

IN THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF:

DICK NUWAMANYA KAMUGANGA

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal constituted by

Mr Christopher Jeans QC, President; Justice Seymour Panton O.J, C.D, member and
Justice George Erotocritou, member.

JUDGMENT

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Introduction

1. In this judgment we will at times refer to
 - (i) the Applicant, Dr Dick Nuwamanya Kumuganga, as “Dr Kamuganga”
 - (ii) the Respondent as “ComSec” or “the Secretariat”
 - (iii) the Southern African Development Corporation (also styled Southern African Development Community) as “SADC”

2. Dr Kumauganga was engaged by ComSec as a consultant for a 21month assignment. The assignment was to render services to SADC in Botswana as “Trade Adviser”. It was SADC who selected Dr Kamuganga and who were to supervise his work.

3. Dr Kamuganga’s contract was terminable without cause on three months’ written notice. It was also terminable by summary written notice in the event of breach or serious misconduct on his part or - and here is the key provision - if he did not perform the assignment “to the satisfaction” of SADC.

4. SADC was not satisfied with his performance- most specifically with his attendance and his output. It eventually requested the termination of his assignment, some six months before it was due to expire. ComSec then terminated his contract summarily on the stated ground that he had not performed to SADC’s “satisfaction”. He was first informed of the termination when the letter of dismissal was read to him over the phone in the presence of others

5. Dr Kamuganga contends that the termination of his employment was both unjustified and procedurally flawed. He also complains that the manner in which it was done - the letter being read to him over the phone - was so humiliating as to amount to a breach of duty by ComSec.

6. We will first set out our background findings of fact. We will then identify and resolve the legal issues which arise. In resolving those legal issues we will make further findings of fact
7. All our findings of fact are made on the balance of probabilities, having regard to all the material before us.
8. ComSec has supported its case by reference to
 - (i) documents (most particularly emails) contemporaneous with events
 - (ii) subsequently produced statements to deal with particular allegations of fact and
 - (iii) a detailed narrative set out in the pleadings.
9. By contrast, Dr Kamuganga produces relatively few documents contemporaneous with events. He does not supply very much (by way of narrative in his pleadings or otherwise) to provide the Tribunal with his own account of the history.
10. Indeed, a notable feature of Dr Kamuganga's pleadings is his outright denial of many allegations made by ComSec, coupled with the repeated observation that the Secretariat is "put to strict proof" of its case, without any positive account as to what he says occurred. Since ComSec's account was to a significant extent supported by contemporaneous documents, the absence of any (or any detailed) narrative response from Dr Kamuganga to various allegations has inevitably influenced our conclusions of fact.

Our Background findings of fact

The medical questionnaire

11. Because of the way in which events unfolded it is necessary to start our findings by dealing with a medical questionnaire completed by Dr Kamuganga when applying for the post.

12. As a candidate for the position of Trade Adviser in early 2014 , Dr Kumaganga was required by ComSec to complete a standard medical questionnaire¹ and medical examination.

13. He completed the questionnaire on 31st January 2014.

14. The first inquiry on the questionnaire was as follows:

“Health History

1. State your health: Excellent/Good/Fair”

He answered:

“Excellent”

15. The second inquiry required him to state whether he had been in hospital within the last five years and if so to state the “nature” of the illness and the “result”. He responded that he had been hospitalised with

“Post traumatic lumbar pain”

and that the result was

“Eased”

16. This was a reference to an injury suffered in a car accident which Dr Kamuganga tells the Tribunal he suffered on 7th April 2013².

17. The third question on the form was whether the applicant had seen a specialist in the past five years and if so for what complaint, when, where and with what “results”. Dr Kamuganga referred to the “Post Traumatic Lumbar Pain”, stated that

¹ Answer- Annex 2

² Application para 15

he had seen a specialist in Rome in October 2013. He summarised the results with the single word

“Eased”

18. In answer to the fourth question he stated that “No restrictions” to his activities had been advised in the past five years.
19. He listed his hobbies as including swimming and travelling.
20. He passed the medical examination.
21. Dr Kamuganga’s answers on the form presented an unjustifiably favourable picture of his health. His health was not “excellent”: he was still suffering from the lumbar pain to a significant degree. The pain had not “eased” but had become progressively worse since the accident.
22. We explain the basis for these findings. As we relate below, Dr Kamuganga was to have substantial absences on account of the lumbar pain over the whole course of his employment with ComSec. He was to explain such absences to ComSec by relating that his condition had declined and the pain had become worse - by clear implication *progressively* worse - since the accident in April 2013. There was no suggestion to ComSec that the condition had flared up only after January 2014 (when he signed the questionnaire or late March 2014 (when he started the employment.)
23. We make due allowance for the features that
 - (i) Dr Kamuganga did pass the medical;
 - (ii) pain of this sort may not be constant but may “come and go”;
 - (iii) exacerbations in pain levels may not always be linear;

- (iv) categorisations such as “Excellent/Good/Fair” are inevitably approximate and the person completing the form will not normally be medically qualified;
- (v) it is perhaps only to be expected that in marginal cases a candidate for employment will indicate the more positive of two categorisations he is offered
- (vi) we have no medical evidence relating to the condition in question.

24. Nonetheless we infer from the terms of Dr Kamuganga’s own accounts to ComSec (discussed below) that his assertions on the questionnaire form that

- (a) his health was “excellent” and
- (b) the pain had “eased”

were inaccurate.

25. It was therefore in ignorance of the fact that Dr Kamuganga continued to have very significant lumbar pain that ComSec appointed him to the position of Trade Adviser.

Appointment terms

26. A Letter from ComSec dated 24th February 2014 enclosed the details of his appointment and the detailed terms offered.

27. The letter explained:

“...This is an arrangement for your services which are being procured for Southern Africa Development Corporation Secretariat, who selected you who will supervise your work. The arrangement will enter into effect on the date of signing...”

28. The location was stated as “Gaborone, Botswana”.

29. The duration was specified as “*Up To 31st December 2015*” with an “indicative date of commencement” (which was later to be varied) of 17th March 2014. The “annual emoluments comprised a “Fee” of 30,205 Euros and various allowances.

30. The letter went on to set out a number of terms and specifically incorporated two annexes.

31. Annex I was a document broadly describing the context of the role offered within what was known as the “Hubs & Spokes II Programme” and a job description. We need not recite the job description. Suffice it to say that it is obvious from the job description that the post involves high level strategic analysis and specialist expertise in international trade and development.

32. Annex II contained the ComSec Terms and conditions for Trade Advisers. The terms make reference to the “Programme”. These references are clearly to the “Hubs and Spokes II Programme”. The terms contain provision for such matters as sickness and holiday leave, benefits (such as life cover) and expense reimbursement.

33. Clause 23.1 provided for the early termination of the appointment in the following terms:

“23.1 This appointment may be terminated prior to its expiry in any of the following ways:

(a) by either party giving to the other written notice of three months

or

(b) by the Programme giving written notice terminating the assignment forthwith in the event of your acting in breach of the terms and conditions of this appointment, or of serious misconduct on your part

or

(c) by the Programme giving written notice terminating the assignment in the event of you not performing the assignment to the satisfaction of the receiving government/organisation”.

34. Pausing there, Sub-clauses (b) and (c) refer to Notice being given by “The Programme”. The “Programme” (ie the Hubs and Spokes II Programme) is not of course a legal entity. In the context of Notice, we take “the Programme” to refer to those with authority at ComSec in relation to the Programme.

35. Three further aspects are worth noting at this stage.

36. First this was not a “staff” post subject to the Staff Rules and Regulations of Comsec (and associated procedures) but a special “consultancy” post.

37. Secondly, although not subject to Staff Rules, Staff Regulations and associated procedures, the position was nonetheless described as a “post” to which an “appointment” was made. It carried a job description, duties, leave entitlements, allowances and fringe benefits (such as life cover) and provision for repayment of expenses all of which are indicative of employed status. Even though the principal annual emolument was described as a “fee”, the contract is in our view properly described as one of employment, albeit employment of a special nature.

38. Thirdly, although the post-holder was employed by ComSec, the object of the employment was to provide services to the “receiving organisation”, in this case SADC. Hence the distinct provision in Clause 23.1(c) that the contract could be summarily terminated if the post-holder did not perform to the satisfaction of SADC. This right of summary termination under clause 23.1 (c) was not dependent on demonstrating serious misconduct or breach of contract by the post-holder such as would justify termination under Clause 23.1(b). In other words, the plain intention of the contract was that there should be a right of termination if the post-holder was not performing to the satisfaction of SADC even if he was not in breach of contract. We address the limits and implications of this below.

The history of the employment

39. Dr Kamuganga began his duties at an office in Botswana on 31st March 2014³.
40. On the Friday of his second week (11th April 2014) he emailed the SADC administration to say that he was unwell and would not be coming in to work⁴.
On the same day an email message from the SADC Director (Ms Boitumelo Gofhamodimo) requested him to put together some material for the following Tuesday for a conference presentation.
41. The following Monday 14th April he emailed SADC administration, saying that he had just come across the Director's request and doubted whether it was "feasible" to handle it because his spine problems made it difficult to sit in one position. In a specific message for the Director he explained that he had been unwell

"experiencing intense pain relating to my spine problems, which also causes a spine headache. I have been to the hospital and was given prescribed pain relief drugs but I have not been able to experience relief up to now. I have requested another appointment with the doctor and I will return this afternoon..."⁵
42. On Wednesday 16th April 2014 he emailed to indicate that he had been treated by neurologists and prescribed three days' bed rest. We infer that he returned to work after that period.
43. Dr Kamuganga was absent again however between 5th and 24th May 2014.
44. On 6th May 2014 he wrote to the Director stating that he "would like to withdraw" his participation in a planned meeting in Cape Town as his neurologist had advised him not to travel anywhere until his "current treatment" (which he did not specify) was finished.

³ Application para 19

⁴ Answer Annex 8

⁵ Answer Annex 8

45. There was some alarm during the period of his May 2014 absence when it was discovered that Dr Kamuganga was not living at an apartment which had been arranged for him. He was to explain this on the basis that he had not received the allowance intended to cover the rent⁶. But SADC was more generally concerned about what it saw as a failure on his part to maintain adequate communication with the office and specifically to provide sick notes. On 15th May Ms Gofhamodimo reminded him of this requirement by email.
46. Meanwhile SADC had reported to Dr Florence Chilenga, who had responsibility for Dr Kamuganga's contract from ComSec in London, that Dr Kamuganga had not been "seen" for some time. In an exchange of emails on 14th May⁷ he explained to Dr Chilenga his lumbar region pains and their origin in the accident a year before. He explained that he had undergone surgery after the accident but, after the surgery had developed "chronic post traumatic lumbar pains" and headaches which intensified with pressure on the spine and right leg. A neurologist in Botswana had now suggested physiotherapy until "further tests and examinations" were conducted. He said he would be returning to work when his health improved but was currently experiencing "severe pains in my back, neck and head and severe difficulties in sitting in particular positions"
47. It is notable that whilst he does mention "an unusual headache" having started on 4th May 2014, there is no suggestion that the chronic post-traumatic lumbar pains he experienced following the surgery had only emerged in very recent months. We mention this as one of several indications that his answers on the medical questionnaire were inaccurate.
48. Further indications that his answers had been inaccurate appeared in an email of 12th June 2014 to Mr Nimrod Waniala , who was initially Project Manager on the Spokes and Hub programme. At this point he had been back at work for 2 to 3 weeks. In this email he said he was submitting an awaited work program and an "official communication" of the circumstances of his ill-health. He related the accident in April 2013, mentioned treatment in Geneva to fuse the discs in his back.

⁶ His email of 14th May, Answer Annex 8

⁷ Answer Annex 8

(This does not feature in his questionnaire answers, which mention only treatment in Rome). He says that the Geneva treatment corrected “the physical problem” but continues (emphasis added)

“However, **since then** I have suffered chronic post-traumatic lumbar pains, involving my lower back, all the way to right leg and through the neck accompanied with bad intermittent headaches. These pains intermittently become severe and I have to take a break from what I am doing. I have **since then been** under a series of examinations **but all of them have recommended a (sic) pain management Plans /palliative Care, with consistent treatments till my nerves fully recovered”**

49. Again we note the absence of any suggestion that the pain is of recent origin. The clear implication is that there has been a continuing problem since the accident and that the treatment he received to correct the problem had, if anything been a trigger for the pain he has suffered since.
50. The email continues by asserting that he had “continued to notify” his supervisor in writing as to when he was unable to attend the office and suggested that it was (and would continue to be) his practice to put in extra time “sometimes the weekends” to compensate for sickness absence.
51. This was not the perception of the Director Ms Gofhamodimo. In an email on 24th June 2014⁸ she complained to Mr Waniala⁹ about Dr Kamuganga’s absences. She expressed the view that Dr Kamuganga was now “trying” to be at the office but had indicated he would not be able to attend on some days. She said that since he had started attending the office at the end of May he was not coping with work demands even though “at this stage it has been really light”. According to her email he was not producing the assignments he had been given and she speculated that she would have to transfer a “brief” she had given him to a new Regional Trade Adviser, Gainmore Zanamwe, whom we understand would become Dr Kamuganga’s superior. Some of the phraseology in this email is cryptic (eg “*I want to believe that*

⁸ Answer Annex 8

⁹ Apparently in a mistaken belief that he was still in charge of the relevant “unit”: see her email to Ms Chilenga of 26th June 2014 Answer Annex 8

we either have a patient or a wrong guy... A formal letter will come should this situation come") but it is clear that she is unhappy with Dr Kamuganga's output, even when he is at work. This is confirmed in a subsequent email to Dr Chilenga, ComSec administration in London dated 26th June 2014¹⁰, where she hints at a doubt as to whether he is truly unwell:

"I guess we just have to keep a close eye but I think it is useful that you guys get to know. A few weeks ago when he indicated he is [sic] undergoing tests, thereafter the doctor will say when he needs surgery or not, he was able to report back to office. I am sure he did not undergo [sic] any operation. My worry is that he is just too slow on assignments. I am not sure he really is not well. Gainmore [Zanamwe] will have to pay close attention"

52. Dr Kamuganga was absent again on sick leave from 30th June to 5th August 2015¹¹. During his absence Mr Zanamwe started in post as Regional Trade advisor. During his absence there was a ministerial meeting for which Dr Kamuganga was to have done work, originally assigned to him in April 2014, to initiate activity on the Industrial Development Policy Framework. He had not done this work. We accept the Secretariat's assertions about this at para 4.10 of the Answer in the absence of any proper narrative account of this from Dr Kamuganga in his Reply¹².

53. Shortly after returning to work in early August 2014, Dr. Kamuganga took extended leave of absence between 18th August and 5th September 2014¹³. He travelled to Uganda to visit his seriously ill mother. She died whilst he was there. He stayed on for some days after her death.

54. On 22nd September 2014 Ms Gofhamodimo wrote to Dr Kamuganga. She first expressed her condolences on his bereavement. She went on to state her concerns about "absences from work without the necessary permission" and "outstanding assignments which you were assigned since your posting and which have not been

¹⁰ Answer Annex 8

¹¹ Answer para 8, Reply para 3

¹² The Reply contains a bare denial at para 17

¹³ In some places this absence is referred to as continuing to 8th September but we understand that Friday 5th September was the last day on which he was due to work and that he returned on Monday 8th September. Little turns on this.

submitted to date.” She pointed out that only three days of compassionate leave had been approved, that it was not appropriate for him to seek further leave retrospectively, as he had done, and that the balance would have to count against annual leave. She noted that she was flagging this for the attention of ComSec. She went on to record concern about absenting himself on other days in the past without notification. She then stated that she had given him two assignments in April (which she identified) neither of which had been completed and requested their completion. She concluded by noting that she was copying the letter ComSec. Somewhat elliptically, she requested Comsec

“to note the prescribed way forward with regard to concerns regarding performance.”

55. The letter was a formal indication of dissatisfaction with his attendance, his non-adherence to absence procedures and lack of work product.
56. Dr Kamuganga denies receiving the letter. We find on the balance of probabilities that he did.
57. A statement¹⁴ from Ms Gofhamodimo records that her Secretary, Ms Sentsho handed the letter to Dr Kamuganga on her instruction and that she did not ask for his signature to acknowledge receipt. A further statement¹⁵ from Ms Sentsho confirms that she did hand over the letter. We see no reason to disbelieve these statements.
58. It would be fanciful to suggest that the letter, which bears her signature, had been fabricated by Ms Gofhamodimo after the event. It clearly reflected concerns she had already been expressing by email and her stated desire to progress those concerns. It is mentioned in later correspondence. (See in particular her letter of 8th June 2015 below).

¹⁴ Answer Annex 5

¹⁵ Answer Annex 5

59. There is nothing suspicious in not having asked Dr Kamugama to sign in acknowledgement of receipt. Indeed, it might be thought disrespectful or untrusting to have done so, given his status as an expert consultant.
60. We are confident that the letter was genuinely written at the time and prepared for delivery to Dr Kamuganga around 22nd September 2014
61. It is of course possible that Ms Sentsho failed in her task of handing it over. She does not say why she remembers handing it to him. But it was obviously a letter of some importance and it seems to us intrinsically unlikely that she would not have delivered it or that Ms Gofhamodimo would not have checked that she had done so at the time. There is also some evidence that Dr Kamuganga may have a tendency to “shut out” critical material: his unwillingness to engage with an unfavourable appraisal at a later stage, which we mention below, is a possible manifestation of this. So his denial of receiving the letter may reflect the possibility that he regarded it as unworthy of his attention at the time and did not remember it.
62. We have to judge the matter on the balance of probabilities. On the balance of probabilities, we find that the letter was delivered.
63. Stepping back for a moment, we find it striking that Dr Kamuganga was not himself writing to ComSec or SADA at this stage to signal any feeling of awkwardness that having taken on this expert-level consultancy for a limited period (and after stating that his health was “excellent”) his attendance had been so limited and his ability to work so badly affected. We do not suggest that his condition was other than genuine and he is entitled to sympathy for the pain he suffered and, of course, for his bereavement. But we would have expected a professional Trade Adviser upon whom a high level programme was dependent to have exhibited greater sensitivity about the pressures his extended absences would necessarily place on others.
64. There are, however, no lengthy absences recorded in respect of Dr Kamuganga between the 22nd September 2014 and December 2014. A table later compiled by Gainmore Zanamwe¹⁶ does record a number of instances over this period where he

¹⁶ Answer Annex 3

was late because he was unwell or visiting the doctor and there was one day of sick absence in December. It also records (and we accept) that he was unable to send work to Regional Experts by a deadline in November because he was unwell.

65. Moreover, email correspondence between Ms Gofhamodimo and Dr Chilenga (ComSec London) reflected continuing concern on the part of the former. In an email of 16th December 2014¹⁷ Dr Chilenga advised as follows:

“A meeting should be arranged with the expert as soon as possible to discuss his lack of delivery (performance issues) as well as the attendance issues, He should be given exactly one month to make amends. He should be informed that this is the final warning.

Any improvement or lack of improvement should be recorded during the one-month period by yourself

Towards the end of the one month period, a comprehensive report noting whether any improvements have been observed should be sent to this office for review and then the Human Resources Division who will decide whether to proceed with the termination of his employment.”

66. Ms Gofhamodimo did not act on this advice. Her reply¹⁸ of 17th December 2014, stated that his performance “continues to be a frustration”. She does not voice any suspicion at this stage that his condition is not genuine. She says that he “irregularly” comes to work, which we take to be a reference to not working a full day on occasions because in these few months before Christmas 2014 he was not regularly absent. She mentioned that he was planning to go to Switzerland for treatment and says that she “almost recommended” ComSec’s reassigning him so that he was nearer this medical institution “*while you give us a replacement*”. She concludes:

¹⁷ Answer Annex 8

¹⁸ Answer Annex 8

“We are currently so busy with the work on the industrial development agenda for the region and it has kept us running since August. He just can’t cope. We are in Johannesburg as I write this for a Workshop and I must really be grateful for the work that Gainmore is doing. Dick could not come. He was sick all last week. Although he was back in office this week, I do not think he is fit for trips nor hectic assignments. Health wise [sic] and of course performance wise.

I will only see him next year and perhaps then you could proceed in the manner you suggest”

67. It is right to point out that, if intended to imply that he was actually away from the office, the statement “he was sick all last week” is not borne out by the record. But we bear in mind the account given by Mr Zanamwe¹⁹ which colours the picture. Dealing with the period from October 2014 onwards he states:

“Even when Dick was in the office he was not well most of the time which made it difficult for Officers to interact with him. His door was always locked and he does not respond to calls or emails as he claims he will be in pain”.

68. In the early months of 2015 Dr Kamuganga took further sick leave including multi-day absences in Early January mid-March and mid-May. He then had a lengthy sick absence from 26th May to 5th June. We accept Mr Zanamwe’s record²⁰ showing a series of occasions over the period January to June 2015 when he was at work but unable to function through illness or had to leave because unwell or keeping a medical appointment.

69. Ms Gofhamodino never implemented the recommendations Dr Chilenga had made in December despite a “chaser” email from Ms Chilenga on 17th February 2015. There appears to have been no response to this chaser.

70. However, there was an attempt to undertake an appraisal process with Dr Kamuganga. After a series of postponements because Dr Kamuganga was unwell

¹⁹ Answer Annex 3

²⁰ Answer Annex 3

an appraisal meeting took place between Dr Kamuganga and Mr Zanamwe. An appraisal form (not produced to us) was prepared. Mr Zanamwe indicated²¹ on the form that Dr Kamuganga's performance was affected by his health condition. The form was submitted to the Director Ms Gofhamodimo who added the comment that Dr Kamuganga's performance was unsatisfactory and requested a meeting with him. Mr Zanamwe informed Dr Kamuganga that the form had been revised by the Director in this way. On 22nd April 2015 he asked Dr Kamuganga by email for his comments on the revised appraisal. On 10th May 2015 Dr Kamuganga sent this reply²²:

“Dear Gainmore,

I very much appreciate that you brought Director's revision of my performance appraisal to my attention before your discussion with her. Like I told you, I am not going to be pre-occupied with her bickering and witch-hunting. I would like within the limits/Extent possible of my health now to focus on supporting you in the context of the project on tasks that add value to the project in the remaining months of my contract as much as possible. My best regards

Dick”

71. We note Dr Kamuganga's refusal to engage with the Director's appraisal and his casual rejection of her perspective as “*bickering and witch-hunting*”.
72. On 18th May 2015 Mr Zanamwe produced for the record his list of concerns about Dr Kamuganga incorporating his table of absences and lateness. We infer from later correspondence²³ that this was passed to Ms Chilenga in London
73. Between 26th May and 5th June 2015 Dr Kamuganga was absent sick once again.
74. On 8th June 2015 Ms Gofhamodimo wrote a formal letter²⁴ on SADC to Dr Chilenga at ComSec to request Dr Kamuganga's replacement. She begins by recording previous communication about concerns relating to Dr Kamuganga's

²¹ See his statement at Answer Annex 7

²² Answer Annex 7

²³ Letter of 8th June 2015 at Answer Annex 4 appears to refer

²⁴ Answer Annex 4

attendance and performance. She refers to the letter of 22nd September 2014 and the “recent note” from Mr Zanamwe (which we take to be his list of concerns at Annex 3 to the Answer). The letter continues (emphasis added):

“We would like to refer the matter to COMSEC as employer to Dr Kamuganga to take the necessary steps to address the problem. **On our part we find the most feasible solution being to ask for a replacement of the advisor** so that we can make full use of the support that COMSEC is rendering our organization.

As you are very much aware, as an organisation, we have embarked on a complex and hectic program relating to the Industrialisation of the SADC region, beginning with the adoption of the industrialization strategy.

This is regarded as top priority in SADC. It will be important that the SADC can make full use of the resources that are available to it”

75. On 29th June 2015 a conference call was organised between ComSec in London and Dr Kamuganga in Botswana with several officers of the SADC in attendance with Dr Kamuganga. A letter²⁵ dated 25th June 2015 addressed to Dr Kamuganga from Damian Dunne, Acting HR Director, was read down the phone to him from London. We infer that the letter was sent or emailed to him following the call. It was a letter of dismissal. The material paragraphs are as follows:

“This is a formal notification that your assignment with the Commonwealth Secretariat Hub and Spokes Programme, for providing services to the Southern African Development Corporation Secretariat (SADC) is being terminated forthwith due to poor attendance and failure to deliver your assignment to the satisfaction of the receiving organisation.

The termination is effective 30 June 2015 to allow you to undertake the requisite handover of any work, relevant files and other office properties.

²⁵ Application Annex 3

It is our view, based on the feedback from the SADC, that you have demonstrated a lack of timely delivery of expected outcomes in your capacity as Trade Adviser Hub and Spokes. The receiving organisation has since September 2014 raised concerns regarding your poor attendance and lack of delivery of agreed tasks in a timely manner and to their satisfaction.”

The letter concludes by explaining financial consequences and confirming details about shipment grant and housing allowance.

76. Dr Kamuganga wrote at length on 13th July 2015 registering his objections and complaints about what he contended was an unlawful termination. Attorneys’ correspondence followed. ComSec did not accept that he should be compensated

77. Dr Kamuganga started proceedings in this Tribunal on 2nd February 2016.

The claim and the issues

78. Dr Kamuganga alleges that the Secretariat acted unlawfully in summarily terminating his contract. He contends that the termination was unjustified and contrary to the terms of the contract²⁶ and that it was in breach of natural justice²⁷. He further contends that the manner in which the termination was announced infringed the implied term in international administrative law that the employer must treat the employee with dignity²⁸. He seeks financial and declaratory remedies.

79. The Secretariat denies these claims. It contends that the termination was in accordance with contractual requirements and fully justified in law. Moreover, it maintains that even if any claim would otherwise be justified, then such claim or any remedy is vitiated because, it contends, Dr Kamuganga obtained the employment on the basis of a misrepresentation on the questionnaire as to his state of health. ComSec also appears to suggest²⁹ in the alternative that if the statements

²⁶ Summary at Application para 47

²⁷ Summary at Application paras 44, 46

²⁸ Summary at Application para 48

²⁹ Answer para 4.15

on the questionnaire form were true then the genuineness of his illness is in doubt and that this also vitiates his claim. The Secretariat claims costs.

80. We deal in turn with the issues

- (i) whether the termination was in accordance with the express terms of the contract;
- (ii) whether the termination infringed any implied limitations on the right of termination;
- (iii) whether the manner of termination infringed an implied duty to treat an employee with dignity.

Our conclusions on these issues have rendered it unnecessary to reach any conclusion on the further question which would have arisen

- (iv) whether any claim or remedy is vitiated by misrepresentation
- (v) whether and if so what remedy should be awarded.

Express terms

81. The Secretariat relies on Clause 19.1 (c) of the Terms and Conditions for Trade Advisers. As we have noted above, these Terms and conditions were incorporated into Dr Kamuganga's contract with ComSec.

82. It will be recalled that Clause 19(1)(c) empowers the "Programme" (which we interpret to mean ComSec management responsible for the Programme) to terminate summarily by written notice in a specified event. Written notice was issued, albeit the notice was initially read down the phone to Dr Kamuganga.

83. The event which must be shown under Clause 19(1)(c) is that Dr Kamuganga was "not performing the assignment to the satisfaction of the receiving government/organisation"

84. The "receiving government/organisation in this case was SADC.

85. So, as a matter of language, the question becomes: was Dr Kamuganga “not performing the assignment to the satisfaction of SADC”?
86. We think it plain that he was not performing the assignment “to the satisfaction” of the SADC.
87. SADC’s dissatisfaction with his performance was long standing and was clearly expressed to ComSec. The letter of 8th June 2015 from Ms Gofhamodimo to Dr Chilenga at ComSec referred to the dissatisfaction expressed in her letter to Dr Kamuganga of 22nd September 2014 and to Mr Zanamwe’s note of concerns. It then formally proposed that Dr Kamuganga be replaced. It is impossible to read this letter as doing anything other than confirming a long held dissatisfaction with his performance and asking for his removal.
88. The summary termination clearly did not infringe the language of Clause 19(1)(c).

Implied limitations

89. Is it sufficient to justify summary termination that the SADC was in fact dissatisfied with Dr Kamuganga or must something further be shown?
90. We consider that in International Administrative Law a clause such as this is subject to certain implied limitations, in particular
- (a) that there must be a reasonable and proper basis for the dissatisfaction indicated – an arbitrary statement of dissatisfaction by the receiving organisation would certainly not suffice
 - (b) that the termination must not infringe the standards of basic fairness recognised in International administrative law.
91. However we further consider that both the issues as to
- (a) what amounts to a reasonable and proper basis for dissatisfaction

(b) the precise requirements of fairness

are subject to context.

92. Relevant features of the context here were

- (i) that this was a relatively short term employment, scheduled to run for some 21 months at most
- (ii) that the whole purpose of the post was to provide a satisfactory service the SADC over that period
- (iii) that it was a high level “expert” post in which senior individuals would inevitably depend on the post-holder
- (iv) that the post-holder could be expected to understand the importance of delivering the work and the need for good relations with the SADC.

Reasonable and proper basis for SADC’s dissatisfaction

93. We consider that there was in the circumstances a reasonable and proper basis for the SADC’s dissatisfaction. Dr Kamuganga had very substantial absences, was not fully-functioning when at work and was not able to attend events or deliver assignments to SADC’s requirements or expectations. In the absence of medical evidence to the contrary we accept that the absences were due to a genuine medical condition. However, even leaving out of account the fact that the seriousness of the condition should have been declared on ComSec’s , medical questionnaire, it is not unreasonable for an organisation such as SADC to be dissatisfied with a lack of work product. It does however go much further than that. Dr Kamuganga had failed to comply with absence procedures and had taken unauthorised periods of leave, in particular in the summer of 2014. Moreover, he had refused in May 2015 to engage with the SADC Director over an appraisal process, using highly disrespectful and dismissive language about her in his email to Mr Zanamwe. Considering that his role was to provide a service to SADC, such an unwillingness to engage with the

Director about his performance was itself a serious cause for dissatisfaction. It can only have compounded the dissatisfaction already felt by SADC.

94. We consider that there was a reasonable and proper basis for the SADC's dissatisfaction.

Fairness

(a) Lack of explicit warnings

95. One question which has concerned us however is whether there should have been an explicit warning to Dr Kamuganga that his position was at risk.

96. Amerasinghe's Treatise, "*The Law of the International Civil Service*" (2nd Edition) notes at pp 383-384 that fairness in international administrative law may require the giving of warnings before an adverse discretionary decision about performance is made. The summary makes clear however the importance of the "written law applicable" – which must mean here the terms of the contract. It is also clear from Amerasinghe's analysis that the need for or extent of warnings is relative and sensitive to context.

97. We have found that the letter of 22nd September 2014 was delivered to Dr Kamuganga but this was more in the nature of a statement of concern than an explicit warning that summary dismissal might follow if he did not improve. The indication from the Director at the time of the attempted appraisal in Spring 2015 that she was dissatisfied with Dr Kamuganga's performance was a further signal of concern; but this also fell short of an explicit warning that he would face summary dismissal if matters did not improve. SADC never did follow the process recommended by Dr Chilenga of issuing a specific and final warning and motoring performance over an ensuing defined period.

98. However, whilst it might have been better if Ms Gofhamodimo had followed Dr Chilenga's advice about giving a final warning, we have concluded that this was not a case where any explicit warning –final or otherwise – was strictly required. This was a contract to provide an expert service to a third party for a short period, based at the third party's centre of activities in Africa. It was very different from an

ordinary contract of long or indefinite duration, subject to the Staff rules, to work at ComSec's base of operations in London, providing a service to ComSec under ComSec management. The need to maintain a satisfactory service to the third party, and the consequences of not doing so, were obvious. On the facts of this case it was or should have been equally obvious to Dr Kamuganga that he was not providing a satisfactory service. Indeed, he was told as much at the time of the attempted appraisal in Spring 2015. He ought to have realised that he was at risk of early termination and we do not consider that an explicit warning was an essential prerequisite of fairness here. Further his dismissive response to the Director's view that his performance was unsatisfactory strongly suggests that he would not have been responsive to warnings in any event.

99. There could be cases where the absence of warnings to an Adviser working at a receiving organisation does entail unfairness. Indeed, the absence of a warning may sometimes mean that there is no reasonable and proper basis for the receiving organisation to be dissatisfied with the services the Adviser is providing. Examples can readily be imagined and it is probably unhelpful to speculate about precise circumstances. Suffice it to say his was not such a case. There were ample grounds on which the SADC could properly and reasonably consider his performance unsatisfactory to the point of seeking his replacement and the decision to terminate his contract was not unfair for lack of explicit warning.

(b) Lack of Hearing

100. Dr Kamuganga complains that the termination infringed fairness because he was not first afforded a hearing of the case against him.

101. We accept that, even in the case of an Adviser providing a service to a "receiving organisation" there will be cases where the absence of a hearing does render a decision to terminate unfair and unlawful

102. This was not such a case. The matters which led to the SADC's dissatisfaction were longstanding performance and attendance issues. They were not founded on

allegations which depended on refined evidential analysis or which would benefit from investigation and debate. In short, they did not relate to issues on which a hearing would have been meaningful and it is unimaginable that a hearing could have affected the outcome

Manner of dismissal

103. Dr Kamuganga brings a discrete complaint that the manner of his dismissal was unlawful. He says that reading the dismissal letter down the phone in the presence of SADC officers was humiliating and infringed the implied term in International Administrative law that the employer must treat the employee with dignity.
104. We recognise that such a duty exists: see eg. **Sunder Singh v Commonwealth Secretariat CSAT APL/27**.
105. We do not consider that the duty was breached in the present case.
106. Since Dr Kamuganga was working at the receiving organisation's premises in Africa it was not inappropriate to deliver the message there. Indeed, it would have been disproportionate to summon Dr Kamuganga to London simply to dismiss him.
107. It would also have been unsatisfactory to deliver the letter without any advance oral communication.
108. Since there was no ComSec office or officer at the SADC premises, SADC was the body to which the service was being provided and was directly involved in the decision to terminate, there was nothing improper in the attendance of SADC officers at the telephone conference at which he was dismissed.
109. Informing Dr Kamuganga of his dismissal down the telephone might, however, be considered undesirable in itself, even in the geographical circumstances. The President, in particular, thinks so. It might have been better to have authorised a SADC officer to deliver the news and letter in person on ComSec's behalf.

110. However, it is not every departure from what a Tribunal (or Tribunal member) might consider best practice which generates a breach of the legal duty.

111. In order to amount to a breach of the legal duty to treat employees with dignity, the relevant conduct must cross a threshold of gravity which is absent here.

112. There was no breach of the legal duty to treat the employee with dignity.

Issues which need not be considered.

113. We have concluded that the summary termination was lawful. We therefore do not need to consider either

(a) the difficult question as to the effect the inaccurate statements made by Dr Kamuganga (on his medical questionnaire) would have had if his claim had been otherwise well-founded

(b) what remedies, if any we would have awarded

Costs

114. We do not consider that Dr Kamuganga's case was unarguable. In the circumstances we reject the Secretariat's application for costs

115. Each party should pay its own costs

Given this 2nd day of January, 2017.

Christopher Jeans QC, President

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

Justice George Erotocritou, member

Richard Nzerem, Secretary

