

CSAT/12(No.1)  
THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT  
In the matter of  
PROFESSOR VICTOR OHIOMETA AYENI  
Applicant  
AND  
THE COMMONWEALTH SECRETARIAT  
Respondent  
Before the Tribunal constituted by  
Justice R A Banda, SC, President  
Dame Joan Sawyer, DBE, PC, Member and  
Justice K.M. Hasan, Member  
October 2007

---

## JUDGEMENT

---

### Introduction

1. This is an application in which the Applicant, Professor Victor Ohiometa Ayeni is contesting the decision of the Secretary-General to, in effect, terminate his contract of employment with effect from 30th June 2006. We would want to say at the outset of this judgment that we have carefully examined all of the materials placed before us including the additional written statements submitted by both parties.

2. The Applicant had originally requested the Tribunal to grant him the following orders:  
An oral hearing of the application and that he be permitted to call witnesses to support his application.  
that he be provided by way of an expedited interim order with the verbatim tape recordings of the proceedings of the Disciplinary Board set up by the Secretary General to investigate him and the Investigation Panel appointed also by the Secretary General to examine his complaints if they were available, and, if not, the records of their proceedings to enable him to prepare his case adequately;  
The Secretariat to provide the original documents that the Applicant has copies of in the Annex to his application.

3. However, we understand that the Applicant no longer wished to pursue these orders and he now agrees that:

the hearing should proceed on the basis of the papers which are before the Tribunal;  
the Applicant does not now require the original documents of his copies except the minutes of the meeting held on 10th October 2005 where it is alleged that the decision not to renew the Applicant's contract of employment was reviewed.

4. This Application is brought to the Tribunal in terms of the provisions of Article 11 of the Statute of the Arbitral Tribunal of the Commonwealth Secretariat and we are satisfied and find that before the Applicant filed his application with the Tribunal he had exhausted the local remedies which were available to him within the Secretariat. We are further satisfied that the application was filed within the prescribed time and we, therefore have the jurisdiction to determine the issues raised in the application.

5. Article II paragraph 4(b) of the Statute of the Tribunal defines "contract of employment in the following terms:

"Contract of employment" and "terms of employment" include all relevant Regulations and Rules in force at the time of the alleged non-observance and include the provisions relating to staff retirement and end of contract benefits."

6. It is clear therefore that the Staff Regulations and Rules constitute an essential part of the terms of contract of employment entered into by any member of staff of the Respondent.

### Application

7. The Applicant is a holder of a BSc degree in Social Science majoring in Political Science and has PhD in Public Administration and Development. He had worked in the Secretariat for seven years before he was promoted to the position of Director of the Governance and Institutional Development Division (GIDD). During this period, there had been no adverse reports on his ability or competence in his professional performance.

8. In contesting the Respondents' decision to terminate his contract of employment, the Applicant has requested the Tribunal to make the following orders:

that the decision was unlawful and was against the Rules and Procedures of the Secretariat;  
that the Applicant be re-engaged or reinstated to his position as Director of the Governance and Institutional Development Division;

that he be appropriately compensated for the loss suffered and

that he suffered continued discrimination over a period of his employment as Director.

9. It is common cause between the parties that the issue of what remedy to be granted, if any, should be left to the end after the issue of liability has been determined.

10. The Applicant was first appointed in the Secretariat from 1st April 1996 and was promoted to the position of Director from 1st October 2003. It is the Applicant's case that while he was on a business trip to Botswana in August 2003, he received a telephone call from Mr Winston Cox, one of the Deputy Secretaries-General, informing him that he had been successful at the interview he had attended and that he had been promoted to Director of GIDD with effect from 1st October 2003. It is further the Applicant's case that during the telephone conversation with Mr Cox that there was no suggestions that the appointment would be on a one term basis only. On his return to London, the Applicant received the official letter of appointment which he accepted on 29th August 2003. The letter of appointment which is dated 26th August, 2003 is in the following wording:

"Dear Dr Victor Ayeni,

With reference to the interview you had on 12th August 2003, I am pleased to inform you that the Secretary-General has decided to offer you an appointment in the Commonwealth Secretariat as Director, Grade CS2 in our Governance and Institutional Development Division (GIDD). The contents of this contract will override any existing contracts you may have with the Commonwealth Secretariat. The appointment will be effective from 1st October 2003.

Your appointment is on contract terms for a period of three years from the date of your appointment. The promotion will be subject to a normal trial of six months. The appointment will, of course, be subject to the Staff Regulations and Staff Rules as they exist now and as they may be amended from time to time by Member Governments and/or the Secretary-General.

Your salary on appointment will be £42,708 (forty two thousand, seven hundred and eight pounds) per annum net of income tax, which is the first point of CS2 scale. Your salary will be paid monthly including your appropriate entitlements."

11. The letter was signed by another Deputy Secretary-General, Mrs Mugasha. The letter of appointment included enclosures relating to tax deduction and a summary of the terms and conditions of the Applicant's appointment. The Applicant contends that two weeks after he assumed duties as Director of GIDD, he met the Secretary-General for the first time since he attended the interview and his subsequent promotion. The Applicant has stated that he was shocked to hear the Secretary-General tell him that: "We didn't really want to appoint you as I didn't think you were competent."

12. It is to be noted that the Respondents deny that the Secretary-General made the remark although, as noted later in this judgment, the Secretary-General himself admitted to the Phillips Investigation Panel that he had made a file note in which he cast doubts on the management skills of the Applicant. The Applicant states that he asked the Secretary-General why he made that statement but did not get a response to it. The Applicant has submitted that this experience which he had with the Secretary-General put him on his guard and made him more determined to work even harder.

13. It appears that the Applicant concluded his mandatory probationary period in March 2004 with an outstanding report from his immediate supervisor who happened to be Mr Winston Cox who was his line manager. It is important to reproduce fully in this Judgment the Appraisal Report made by Mr Cox on the Applicant. The Report is as follows:

Managing partners and managing resources -

Effective. He has engaged in rebuilding relations with CPAM and CACC especially redeployment of personnel and has taken measures to address gaps between commitment and spending.

Creativity and vision, problem solving, decision making

Highly Effective. Has shown ability to think through issues and arrive at solutions.

Implementing change, interpersonal diversity communication, work organisation and time management - Highly effective. Has vast experience.

SECTION 3: Victor has come to terms with the management of GIDD and has a sound understanding of the Division's work and importance to its clients. He has already started to address the issue of responsiveness and I look forward to further advances."

14. Mr Cox also observed as follows:

"He has worked hard and has succeeded in gaining the confidence and respect of his colleagues."

Overall assessment of performance: Performance exceeds standards required.

15. Sometime in 2004, a Canadian lady by the name of Laura Dempsey joined the Secretariat in the Applicant's Division to work as adviser on money laundering. It is the Applicant's case that things suddenly began to change two months after she arrived. The Applicant states that things started to change when he declined to approve Dempsey's request to travel on a business trip to Mauritius. The Applicant took the view that there was no need for the trip and that Dempsey should concentrate on developing her programme area and her future work plans. On the following day, 14th July 2004, Dempsey wrote a letter to Mr Cox and copied it to the Secretary-General. Dempsey made a scathing attack on the Applicant's ability and competence to lead the GIDD. In particular, Dempsey alleged that the Applicant had failed to grasp and did not understand the need for her to provide accurate and meaningful advice to the various jurisdictions she had to work with. She did not appear to like the Applicant whom she felt had little or no knowledge about her particular area of expertise. It is significant that Dempsey wrote that letter only four months after Mr Cox had given the Applicant a highly positive report in all areas of expertise of the Applicant on which Dempsey was criticising him. What is even more astonishing is the fact that at the time of writing the letter Dempsey was, in fact, still on probation and held a junior position to that of the Applicant. Dempsey stated that there had been severe management problems within the Division and that the Applicant was not giving direction or clear leadership and that the Applicant's management skills to lead the Division were totally lacking. It is important to refer to what Dempsey says in her letter in some detail at this stage in our Judgment because it will be necessary to refer to it later. It would appear that Dempsey had discussed the contents of the letter with Mr Cox unbeknown to the Applicant although the Respondents deny this suggestion.

16. It is clear, in our view, that given the highly positive appraisal report on the Applicant there was no factual basis for Dempsey's criticism of the Applicant's ability and competence to provide professional and administrative leadership. It is therefore surprising to find that the Respondents accepted Dempsey's allegation as true and used them as vindicating their criticism of the Applicant's management skills. It is difficult to see any plausible explanation why the Respondents readily accepted Dempsey's allegations against their own report which they had made only four months earlier and which clearly contradicted in every respect all that Dempsey had said about the Applicant's ability and competence. The Respondents have not nullified Mr Cox's appraisal report on the Applicant. The Respondents, in our Judgment, did not deal with the Dempsey matter in an even handed manner in so far as the Applicant was concerned. We note what the Phillips Investigation Panel stated on this issue.

".....We believe that Dr Ayeni's concern about the way in which the issue of his contract was handled and that in which Carlton and Dempsey affairs were dealt with without due adherence to the spirit and letter of the relevant provisions are well founded."

17. We note from the pleadings that various allegations and counter allegations have been made in this case. It is not our intention to address all of those issues in this Judgment. We believe those allegations have sufficiently been addressed by both the Phillips Investigation Panel and in the Disciplinary Board. We attach importance to the findings of the Phillips Report because both parties had the opportunity to examine witnesses who appeared before the Panel and we find that neither side took any exception to the Report. Indeed, the Phillips Investigation Panel was set up to specifically investigate those allegations. We will, therefore, only refer to those issues in so far as they are relevant to the resolution of the primary issue before the Tribunal, namely the termination of the Applicant's contract of employment.

18. The Applicant has contended and believes that he has been subjected to discriminatory treatment by the Secretary-General on the grounds of his race and nationality. He has submitted that this discrimination has taken the form of less favourable treatment throughout his employment starting from

the alleged comments made by the Secretary-General about his reluctance to appoint him in the first place, his treatment of the Applicant during his employment, for example, over the Dempsey case, culminating in the fact that the Applicant was allowed to stay in the post for only one term whereas other people appointed to the position of Director were normally allowed to stay in the post for at least two terms. The Applicant has stated he raised these issues with the Secretary-General but did not receive an objective response. The Applicant has submitted that he has been subjected to a series of events in order to prove the Secretary-General's initial decision to appoint the Applicant for one term was correct. The Applicant cites the Phillips Investigation Panel which he contends did not support the Secretary-General's contention that the decision not to renew the Applicant's contract of employment was based on the report of the Interview Panel. The Secretary-General's contention was also, it would appear, contradicted by the evidence of Ms Cowden who sat on the Interview Selection Panel. The following is what the Phillips Investigation Panel states:

"We note, however, that there is a conflict with the evidence of the H.R. person who told us that in fact, Professor Ayeni's management skills had been considered by the Interview Panel and not found wanting. We would note that on being tested under probation his management performance had been appraised as exceeding the standards required."

19. The Applicant contends that the Secretary-General refused to change his initial decision in spite of the highly positive report made by Mr Cox on the Applicant. He has therefore submitted that however hard he may have worked, it would have made no difference to the Secretary-General who had already made up his mind not to renew the Applicant's contract of employment. The Applicant has contended that he was denied the opportunity which the Handbook gives him in the determination of new contracts and that the only reason for this was because the Secretary-General had already made up his mind about the Applicant. While it is true that the HR Handbook does not give automatic right to a contract it gives a right to a member of staff to be considered for another contract. The Handbook states:

"In all cases the granting of a new contract within these periods of tenure will be subject to fully satisfactory performance and the needs of the Secretariat."

20. The Applicant has therefore submitted that his performance in the post should have been considered as is required by the Staff Regulations.

21. The Applicant, as we have already noted, was promoted to the position of Director which falls within the grading of CS1-CS4. The first and fourth provisions of the Human Resources Handbook deal with the rotation policy which stipulates that staff in grades CS1-CS4 normally serve two-three year contracts and are subject to the rotation policy. The second provision deals with the inclusion in the letter of appointment information on the term of the contract and whether the rotation applies. The third provision deals with promotion and application for posts within the same grade where the successful Applicant's new contract will be subject to the normal period of tenure for the higher levels. This is, of course, subject to the exercise by the Secretary-General of his discretion as to the length of the term to be given. But his discretion, as has been established by the jurisprudence of international administrative tribunals and, in our Judgment, must be exercised fairly and in accordance with the rules of natural justice.

22. The Applicant has submitted that the discretion which resides in the Secretary-General under the HR Handbook was not properly and fairly exercised in accordance with the rules of natural justice. He contends that the decision had already been made even before he was appointed without due regard to the Applicant's ability to do the job during his time in post and after successful reviews. The Applicant submits that failure to follow the proper procedure which is laid down in the HR Handbook and failure to bring the matter to the Management Committee before its alleged meeting of 10th October 2005 provide evidence to show that the decision had already been made by the Secretary-General. The Applicant has submitted that the absence of an objective reason for non-renewal of his contract proves that the only reason for the treatment he received was based on his race and nationality and that this is contrary to the Commonwealth Secretariat's own policies which are set out in the HR. Handbook and which states as follows:

The Secretariat will operate a policy of zero tolerance against harassment;

Discrimination; harassment is defined as repeated, unreciprocated and unwelcome comments, looks,

actions, suggestions of physical contact that are found objectionable by the recipient on grounds of sex, race, sexual orientation, culture, or any other minority issue such as disability; Grievance concerning harassment, offensive behaviour or discrimination brought to the attention of management will be treated seriously with absolute confidentiality and with scrupulous fairness to both parties.

23. The Applicant has argued that these provisions in the Handbook were not followed and has submitted that even if the Applicant's treatment was not on the ground of his nationality, it was still against the rules of natural justice in that he was treated differently from other directors who were given second contracts.

24. The Applicant has also contended that his contract of employment was not renewed because he was looked upon as "whistle blower" for drawing attention to what he calls "undesirable" aspects of the Commonwealth Secretariat as a workplace and that he had to go. The Applicant has submitted that the fact that the Secretary-General's decision was always to be that the Applicant was going to be employed on one term contract and the fact that his decision was not to be reviewed on proof of the Applicant's performance including successful appraisals show that the Secretary-General's decision was an arbitrary decision which cannot be objectively explained.

The Respondent's position

24. The Respondents have denied that the decision to terminate the Applicant's contract of employment as Director of GIDD and not to permit him to continue for a second term was unlawful and/or otherwise against the rules and procedures of the Secretariat. The Respondents have also denied that the Applicant is entitled to any order that:

he be reinstated to the position of Director of GIDD or otherwise be re-engaged;

he be compensated for the alleged loss arising from his termination and/or non-renewal.

25. The Respondents further deny that the Applicant has suffered continuing or any discrimination on grounds of race or nationality during his period of employment as Director or that he is entitled to any compensation on such grounds. The Respondents, although they deny that the Phillips Investigation Panel report suggested that the Applicant should receive "adequate compensation", they accept that the Report had recommended that a solution be found:

"to facilitate Professor Ayeni's exit from the Secretariat.... on as reasonable financial terms as possible."

26. The Respondents contend that they implemented this recommendation following the publication of the Report but do not indicate how it was done.

27. The Respondents have further denied that the Applicant is entitled to a written apology for himself and his family for discriminatory treatment and harassment that he allegedly suffered. The Respondents contend that the Applicant was appointed to the position of Director of GIDD from 1st October 2003 on the understanding that the appointment would be for one term only and his contract would therefore expire on 30th September 2006. The Respondents submitted that it was made clear to the Applicant at the time of his appointment that his contract would not be renewed. It is argued that the Secretary-General was entitled to make that decision as it falls within the area of his discretion. It is significant to observe that the Respondents concede that in making the decision to offer the Applicant only one term contract was an "express departure" from the Respondents' own normal rotation policy which states as follows: "Staff in grades CS1-CS4 would normally serve two three-year contracts."

28. But they still argue that in the circumstances the Applicant had no right to expect that his contract would be renewed on expiry of its three year term. The Respondents contend furthermore that the Applicant, unlike employees to whom the normal rotation applied, had no lawful expectation that his contract would be renewed for a further term subject only to the issue of performance and/or organisation needs.

29. It is difficult to understand the Respondents' line of argument because their own Staff Regulations and Rules applied to all officers in grades CS1-CS4 and they have not denied that the Applicant was within the grades to which the rotation policy applied. The Respondents have to show good reasons why the normal policy could not apply to the Applicant and that is one of the issues which we have to determine.

30. The Respondents have continued to contend that they were not required to consider, as they would have done with staff subject to the normal rotation policy whether the Applicant's subsequent

performance in post justified renewal of the contract. They have submitted that they were entitled to allow the contract to come to an end and to rely on the original decisions that no renewal would be offered and that that was exactly what they did.. They have contended that the Applicant's contract of employment was brought to an end on the expiry of the original three year term on 30th September 2006. They have argued that this was in accordance with the original intention of the Secretary-General and that decision was confirmed by the Management Committee on 10th October 2005.

31. The Applicant has cast doubt on whether the meeting of 10 October 2005 ever took place. The Respondents submitted that the Applicant's contract of employment came to an end at the expiry date and its termination was entirely lawful and that the relief sought by the Applicant should be refused. They appear to base that construction on the alleged conversation between the Secretary General and the Applicant on 3 September 2003 and on the acceptance slip signed by the Applicant in which it is stated that he accepted appointment "on the terms and conditions stated above" and that "I understand that I have no legal or other right to a further contract." We do not accept that the interpretation put on this statement means that the Applicant was signing away his legitimate expectation to be considered for a second three-year term.

32. The applicable law for the Tribunal is defined in Article XIV of the Tribunal's Statute which gives guidance as to the law which is to be applied by the Tribunal. That Article states as follows:

"1 In dealing with all cases before it in relating to contracts of service the Tribunal shall be bound by the principles of international administrative law which shall apply to the exclusion of the national laws of individual member countries.

For the purpose of this Article, contracts with Applicants referred to in Article 11.4(a)(vi) shall be treated as contracts of service.

In all other cases, the Tribunal shall apply the law specified in the contract. Failing that it shall apply the law most closely connected with the contract in question."

33. International Administrative Tribunals have had occasion to comment on the nature of a fixed term contract. From early on, in the case of Duberg, ILOAT Judgment No 17(1955) (UNESCO), the International Labour Organisation Administrative Tribunal (ILOAT) interpreted a provision within staff regulations and rules to mean that although a fixed-term contract expires without notice or indemnity upon completion of the fixed term, it no way barred the Tribunal from assuming jurisdiction over a complaint requesting that the legality of the positive or negative decision concerning renewal taken by the administrative authority be examined. The International Court of Justice which was invited to pronounce on the question of whether the ILOAT had exceeded its jurisdiction in those cases it had decided it had jurisdiction held that it had not. The ICJ took the view that UNESCO had issued a law creating administrative memorandum which in effect promised a category of staff members the renewal of their fixed-term contracts, subject to their fulfilling certain requirements (like satisfactory performance), within a stipulated period of time, say six months, before the expiration date of the fixed-term contract. It further held that on the basis of that memorandum, the claim that the fixed-term contracts should have been renewed was more than a mere allegation and gave rise to a genuine dispute of a legal nature relating to the terms of the employment of staff members. The ILOAT has adopted this approach in subsequent cases coming before it.

34. But in the case of Howrani the United Nations Administrative Tribunal (UNAT), had adopted a different approach holding that, assuming the absence of any irregularities in any respect, it was difficult to see how the failure to renew a fixed-term contract upon its expiration date could amount to a non observance of the terms of appointment which would inflict on the holder of appointment an injury for which the holder could reasonably claim to be compensated: UNAT Judgment No. 4(1951) JUNAT Nos 1-70, page 8 at p.21.

35. However, subsequent to the Howrani case, UNAT has consistently affirmed its jurisdiction to examine the merits of each case in order to ascertain whether the holder of a fixed-term contract had an expectancy of renewal. Both the UNAT and ILOAT have rejected the argument that a fixed-term contract terminates automatically on the expiration date it being necessary that there be an administration decision not to renew the contract and especially if, as in many cases, the work connected with the contract is expected to continue after the date of expiration and, indeed, as long as the organisation

continued to exist. In the case of O'Connell, Judgment No 469 (1982) (PAHO) the ILOAT confirmed the position that even notwithstanding an express statement in the Staff Rules that the contract came to an automatic end on its expiration date, it would treat the administrative decision as the exercise of a discretionary power over which it had the power of judicial review.

36. It is clear therefore that the Tribunal has the jurisdiction to review the Secretary-General's decision even if the letter of appointment had specifically mentioned that the Applicant was being offered a fixed term contract. The International Tribunals have also consistently held that the discretion of an administrative authority is not absolute and have described their power of review as being a limited one. The limitations have been stated in the following terms:

"The Tribunal may exercise only a limited power of review over such a decision and indeed will quash it only if it was taken without authority or in breach of a rule of form or procedure or if it rested on an error of fact or law, or if some essential fact was overlooked, or if there was an abuse of authority, or if clearly mistaken conclusions were drawn from evidence." Byrne v Sutton, ILOAT Judgment No 592 (1983)(ITU).

37. An Administrative authority must give reasons for its decision and where it fails to give clear reasons for the non renewal of the contract the Tribunal will examine the evidence available in order to establish whether or not the decision was improperly motivated.

38. The Commonwealth Secretariat came into being in 1966. It is important to note what the Agreed Memorandum of the Commonwealth Secretariat, as amended, states regarding the Secretariat's responsibilities in the recruitment of staff. It provides as follows:

"The paramount consideration in the selection of staff and in determination of conditions of service will be the necessity of securing the highest standards of efficiency, competence and integrity due regard being had to the importance of recruiting the staff on as wide a geographical basis as possible within the Commonwealth. The Secretary-General will have discretion, in the light of the above considerations, to appoint professional staff to the service of the Secretariat. In so doing the Secretary General shall consider names submitted by Commonwealth governments who need not feel themselves limited to government servants in submitting nominations, as well as candidates applying directly."

39. The Agreed Memorandum provides, together with the Staff Regulations and Staff Rules the principles upon which the Secretariat and therefore the Secretary-General will exercise the discretion with regard to the employment of staff.

40. Chapter 7 of the HR. Handbook provides, inter alia, for a letter of appointment contract for established posts and the application of a rotation policy. Under contracts for established posts the Handbook provides as follows:

Paragraph 3. Deals with contracts for established posts..

Paragraph 3.1 Deals with arrangements for the various grades which are CS7-CS10. Staff appointed to established posts in these grades are offered term contracts, normally of periods up to three years renewable subject to fully satisfactory performance and the needs of the Secretariat.

Grades CS2-CS6 Staff appointed to established posts in these grades (including on promotion) will be offered term contracts, normally of periods of up to three years and are subject to the rotation policy set out below.

#### **4 The Rotation Policy**

4.1 Member Governments have consistently emphasised that the manner in which the Secretariat is staffed should ensure that it is able to respond to changing demands and priorities; with an appropriate skills, balance and a regular inflow of new ideas and energy. To achieve this, staff in grades CS6 and above are subject to the rotation policy that sets a limit on the length of time an employee may remain in the Secretariat. The experience gained working with the Secretariat therefore provides an opportunity for staff to enhance their careers rather than a career for life.

4.2 To meet the challenging demands and needs for a regular flow of ideas and energy the Secretariat operates a rotation policy which sets a limit on the length of time they may remain in the Secretariat's employment. New guidelines were issued in March 2003 setting out the background to the rotation policy and the manner in which it will operate. These guidelines are set out in Annex 10.

4.3 The main points are these. Staff in grades CS1-CS4 normally serve two-three year contracts within Secretariat. Deputy Secretary (Grade 1 `) are personally selected by the Secretary-General who may exercise discretion on the length of tenure; and

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

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

41. There is no doubt in our minds that the Agreed Memorandum, as amended, together with the provisions in the Handbook provide the objective basis on which the Respondents and therefore the Secretary-General should use when exercising their discretion in recruiting staff for the Secretariat. It is common cause that the rotation policy applied to the post to which the Applicant was appointed on 1st August 2003 and therefore that the rotation policy applied to him. The Respondents have accepted that normal position at Director level was to offer contracts of employment for two-three year contracts. On their own admission it was unprecedented not to offer a two-three contract to a Director. Indeed, in all the twelve previous directors a second contract was given. The three cases where no such contract was given were not at director level. As we have already noted earlier the Respondents have admitted that it was an express and deliberate departure from the normal practice not to offer the Applicant a second contract because it was a decision which the Secretary-General had made in the exercise of his discretion. As we have indicated earlier, the discretion of an administrative authority is not absolute. This Tribunal has jurisdiction to review the manner in which the discretion was exercised. It is true, however, that the power to review the decision of an administrative authority is limited in that the decision can only be questioned if it was taken without authority, or was in breach of a rule of form or procedure or if it rested on an error of fact or law, or if some essential fact was overlooked or if there was an abuse of authority or if a clear mistaken conclusion was reached.

42. While it cannot be disputed that the Secretary-General, as head of the Commonwealth Secretariat, is entrusted with the overall responsibility for the employment of staff and in the discharge of other responsibilities, he has to discharge those responsibilities within the fundamental parameters which the Agreed Memorandum together with the Staff Regulations and Staff Rules as laid down in the HR Handbook have prescribed. We have carefully considered and reviewed fully and in considerable detail the respective arguments, as disclosed on the papers filed before the Tribunal. We must state for the avoidance of doubt that our primary responsibility in the application is to determine whether the decision not to offer the Applicant a second term contract was proper and lawful.

43. Regulation 12 of the Staff Regulations states that it is a requirement that every member of staff should receive, on appointment, a letter of appointment which forms, together with the Staff Regulations and Staff Rules, his or her contract of employment. The letter of appointment must contain certain information including the nature of the contracts being offered and whether rotation applied and any special conditions which may be applicable. The Respondents have continued to contend that the Applicant was informed that the contract of employment he was being offered would only be for one term. But the letter of appointment which the Applicant received does not support the Respondents' contention on this score. If the decision not to offer a second contract to the Applicant was, as it appears, made very early after the Interview Panel made its recommendation, it was imperative and critical that the nature of the contract which the Respondents were offering to the Applicant should have clearly been set out in the letter of appointment. It did not. Regulation 12 requires that this should be done in the letter of appointment. It was such a critical term of contract which could not be left to inference. The Disciplinary Board found in their report that the letter of appointment to the Applicant did not mention the nature of the contract which was being offered to the Applicant. In a rather contradictory observation the Board said,

"It is clear from the contract letter, signed by Professor Ayeni, that he was offered one contract only with no legal or other right to a second contract, but this should have (been) stated in the first paragraph of the letter as had been the case for other employees receiving one term contract."

44. It is clearly important therefore that an employee receiving a one term contract is so informed in the letter of appointment. The Applicant was not so informed. The letter of appointment which was sent to the Applicant included a summary of terms and conditions for a head of a division. That summary stated as follows:

“Appointments are limited term contracts usually of three years. Contracts may be renewed by mutual agreement and subject to fully satisfactory performance. Staff in this level may normally serve for no more than two-three year contracts The Secretary-General will retain the flexibility to approve or decline extensions as circumstances warrant.”

45. There is no doubt in our minds about the import of the letter of appointment together with the summary of terms and conditions sent to the Applicant. They were informing the Applicant that at his level of appointment he could expect no more than two three year contracts. The Applicant as Director was entitled to be considered for extension of his contract as it appeared to be the normal practice for heads of divisions as the Applicant was. This normal practice was deliberately departed from in the case of the Applicant and there ought to be good reasons why that practice was not followed. The onus is on the Respondents to adduce objective evidence to support the decision not to offer a second three year contract and to show that in reaching that conclusion the Respondents were not acting on a pre-determined position of the Secretary General and did not close their minds to the possibility that even if the Applicant was weak in certain aspects of his functions, that there could have been real improvement in those areas during the period of two years. Ms Goodings, a senior member of staff of the Respondents informed the Phillips Investigation Panel that “there had been other single contracts at Deputy Director level” but according to another member of staff of the Respondents it was unprecedented not to offer a second contract to a head of a division. Ms Goodings nevertheless herself acknowledged that an appointment on a single contract was not the “norm”. And the following is what the Phillips Investigation Panel said:

“.....We cannot discount the possibility that upon that moment, the Professor, being fully conversant with the provisions of the Handbook on this score, may have harboured what might be considered a reasonable expectation, of receiving a renewed contract subject to satisfactory performance. This expectation could have been fed further by the ambiguity between paragraphs 3 and 7 and the signed page 3 of the letter offering the appointment when read in conjunction with the provisions in the Handbook contained at page 32 paragraphs 4.3; 5.1, 81 and 123 paragraph 11”.

46. There are, in our Judgment, sufficient and reasonable grounds for the Applicant to have expectations that his contract would be renewed, namely:

Letter of appointment made no reference to one term contract

The rotation policy applied as it was the normal policy and had been renewed in twelve previous contracts for directors

It was unprecedented not to offer a second contract to a director

The Applicant’s performance in post and during his probationary period exceeded required standards.

47. The Respondents have consistently contended that they offered the Applicant one term contract only because his management skill was not to full expectation. There was no other reason given and having given a reason they were under a duty to substantiate it.

48. We found it surprising that the Respondents considered Dempsey’s allegations against the Applicant to be a vindication of their own opinion about the Applicant’s lack of ability and competence. Dempsey was a new officer who had just arrived to work in the Secretariat under the Applicant and had only worked in the Secretariat a few months before she wrote her letter of complaint about the Applicant. And yet, the Respondents were prepared to accept her allegations in preference to the appraisal of the Applicant by Mr Cox, a Deputy Secretary General, who is not only the Applicant’s line manager but also considerably senior to Dempsey. The Respondents have not suggested that the appraisal report which Mr Cox had made was wrong or that they had nullified it and it would have been surprising if they had done that. If the management skills were so critical a consideration for the appointment then the Respondents should have appointed the other candidate who was found to have better management skills than the Applicant. The fact that they still appointed the Applicant despite his alleged “lack of management skills” destroys the credibility of their contention. The Phillips Investigation Panel made the following observation.

“A file note endorsed in the Secretary-General’s handwriting, dated 18th August 2003 reads, “single 3 year contract to Dr Ayeni to be offered only. His management skills not up to full expectation and therefore close scrutiny will be expected”. The word “only” is underlined three times. The Secretary-General confirmed to the Panel that the underlining was his; that it was intended to emphasise his decision on the appointment. We took note, however, that there is a conflict with the evidence of HR person who told us that in fact Professor Ayeni’s management skills had been considered by the Interview Panel and not found wanting. We would also note that on being tested under probation, his management performance had been appraised as exceeding the standard required.”

And significantly the Phillips Panel further observed,

“In any event, it seems to the Panel that if management skills was the critical factor for the post, then the other candidate recommended as the “stronger performer in people management” not Professor Ayeni might have been appointed.

49. Indeed the appraisal report to which the Phillips Panel referred shows that in 10 out of 13 points of appraisal the Applicant had been assessed as highly effective and effective in the remaining 3. It should be noted that the appraisal report effectively rebutted all the allegations which Dempsey had made in her letter. We note a curious similarity in the allegations which Dempsey made in her letter as if they were made to destroy all that Mr Cox had said about the competence of the Applicant. It would seem to us that Dempsey’s letter was written in order to have “a go” at the Applicant for having refused her request to travel abroad. It would also appear to us that the letter was written when her relationship with the Applicant had gone sour and we attach very little weight to the contents of her letter, especially in view of the reports by the Interview Panel and by Mr Cox.

50. We also find difficult it to understand why the Secretary-General would state that the management skills of the Applicant were not to the full expectation notwithstanding the Interview Panel’s recommendation that the management skills of the Applicant were not found wanting. The only clear pieces of evidence before the Tribunal about the Applicant’s management skills are the Interview Panel’s report and Mr Cox’s performance appraisal of the Applicant which found the Applicant’s management skills not wanting.

#### Conclusion

51. The only reason the Respondents gave for refusing to offer the Applicant a second contract , it seems, was the Secretary General’s decision that the Applicant shall have only one contract on the basis that his management skills were not up to full expectations but which is not supported by the evidence before us .

52. There was no other reason given. The weight of the evidence before the Tribunal shows that the management skills of the Applicant were not less than effective and his overall assessment was that he exceeded standards required. This evidence effectively destroyed the whole basis on which the Respondents premised the entirety of their arguments. Although allegations of misconduct against the Applicant were raised and the Disciplinary Board was set up to investigate these, the Respondents did not rely on them as justification for the non renewal of the Applicant’s contract. And those allegations were made after 10 October 2005 as claimed by the Respondents. Had the allegation of misconduct been relied on and proved to the standard required, this judgment should not be taken as in any way condoning such conduct.

53. It is not sufficient, in our Judgment, for the Respondents to simply state that it was the decision of the Secretary-General because it falls within the discretion which he has. They must show the basis or principles or factors on which the discretion was based. The discretion which resides in the Secretary-General in matters of recruitment of staff must be exercised properly and judicially and this Tribunal has the jurisdiction to review how that discretion was used, which is not to suggest that the Tribunal can substitute its own discretion for that of the Secretary General The discretion is subject to and cannot override the established Staff Regulations and Staff Rules. It is to be noted that member governments introduced the rotation policy for a purpose. As we have noted, some guidelines were enacted in 2003 and the objectives were that the policy should be implemented. Clearly, the policy of the guidelines was not implemented with regard to the Applicant in this case. In our view the rotation policy promises to a category of staff members a renewal of their fixed-term contracts in appropriate cases. The Applicant belonged to that category of members of staff.

54. It is to be noted also that the decision not to offer a second contract to the Applicant was not taken following an appropriate review procedure by the Management Commitment and if it was, it was only taken two years after the decision not to offer a second contract had already been taken by the Secretary-General. We are satisfied on the evidence before us that the discretion was not properly exercised as the only basis on which the exercise of the discretion was premised has been effectively destroyed.

55. Consequently we must find that the refusal to renew the Applicant's contract was unlawful and that decision is set aside.

56. In the light of this judgment, and as requested by the Respondents in their Answer, it is now open to the parties, if they so desire, to make submissions to us on the appropriate remedy and or level of compensation the Tribunal should award.

Given on this 12<sup>th</sup> day of October 2007 in London

Signed

Justice R A Banda, SC (President)

Dame Joan Sawyer DBE, PC (Member)

Justice K M Hasan (Member)