

CSAT/12(No.2)

JUDGMENT OF THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

AUGUST 2008

IN 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

Justice K M Hasan

Messrs Underwoods, Solicitors for the Applicant

The Director, Legal Division of the Commonwealth Secretariat for the Respondent

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#### DECISION ON REMEDY

This decision is to be read with the judgment of the Tribunal given in this matter on 12 October, 2007.

CONSIDERING the Commonwealth Secretariat Arbitral Tribunal's judgment dated 12 October, 2007 in the matter between Professor Victor O. Ayeni ("the Applicant") vs the Commonwealth Secretariat ("the Respondent") declaring the refusal by the Respondent to renew the Applicant's contract unlawful and setting it aside and affording the parties an opportunity to make submissions on the appropriate remedy and a level of compensation

CONSIDERING the submission in relation to remedy and schedule of loss filed by the Applicant on 17 March, 2008; the Respondent's submissions on remedy filed on 16 April 2008, and the subsequent comments by the parties on their respective submissions

CONSIDERING Article X of the Statute of the Commonwealth Secretariat Arbitral Tribunal relating to the powers of the Tribunal to award compensation,

The Applicant requested an oral hearing by the Tribunal to determine the outstanding issues of remedy and compensation which his lawyers estimated would last five days but which the Tribunal decided to deal with on the written submissions and any documents submitted by the parties.

1. The relevant issues raised regarding the remedy and level of compensation that we have been invited to consider may be summed up as follows:

In his submissions relating to remedy, the Applicant has annexed a schedule of loss containing the following claims:

(i) " FINANCIAL

Items

Gross salary @ 4.6% annual Adjustments)

2007 - 76,705.27

2008 - 80,233.70

2009 - 83,924.42

Subtotal: 240,863.42

Interest on 2007 salary for one year at 4% (see Note 1): 3,068.21

Gratuity @ 15% of total of 240,863.42

Subtotal: 36,129.51

Interest thereon for one year at 8% (See Note 2): 2,890.36

Leave entitlement @ 30 days annually

2007 - 5,699.65

2008 - 5,961.84

2009 - 6,236/09

(see Note 4)

Subtotal: 17,897.58

Interest on 2007 leave entitlement 227.99

for one year @ 4%

(See Note 5)

Economy Class return ticket for Home leave (London to South Africa for 6 persons) 7,752.00

Business Class ticket For end of Contract Repatriation to Point of Recruitment 21,774.00

(South Africa) for 6 persons

15 kg Excess Luggage Allowance per person (BA charge at 75 per person x 6) 450.00

Children education allowance (X 1 university and 2 secondary) 27,000.00

Transportation of personaleffects by sea including insurance (London to Pretoria): 5,897.00

Mitigated losses -2,625.00

TOTAL 3 YEARS SALARY & BENEFITS 361,325.07

COMPENSATIONS

Damage (stigma) to Professional Reputation 100,000.00

(see Note 6)

Compensation for injury to feelings including aggravated damages 40,000.00

Interest on compensation For injury to feelings for One year at 4% (See Note 7): 1,600.00

Exemplary damages 60,000.00

Interest on exemplary Damages for one year at 4% - (see Note 8): 2,800.00

Damage to intellectual Property (Cost of re-writing 2 draft book publications and other work in progress stored in computer and email account but destroyed on the orders of the Secretary General): 55,000.00

Claims toward Legal costs (Personal Expenses) - see Note 9: 750.10

Claims towards Legal Costs (Lawyers Fees): 65,000.00

Subtotal: (Provisional) £324,750.10

TOTAL COMPENSATION £686,075.17

(ii) The Applicant also asked for a written apology from the Secretary General.

(iii) The Applicant claims that he was deprived of equal protection from discrimination and injustice and subjected to inhumane and degrading treatment resulting in losing his job.

(iv) Subsequent to the refusal to renew the Applicant's contract, the Secretary General appointed a new substantive director without awaiting the decision of the Arbitral Tribunal, the Applicant then surrendered any right he may have had to be reinstated as he felt that this would be less disruptive. At page 4 of his submissions, the Applicant quoted Article X of the Statute of the Arbitral Tribunal of the Commonwealth Secretariat which reads as follows:

"If the Tribunal finds that the application is well-founded, it shall order the rescission of the decision contested or

the specific performance of the obligation invoked. Where an application is made by a staff member, the Tribunal

shall, at the same time, fix the amount of compensation to be paid to the applicant for the injury sustained, provided

that such compensation shall not exceed the equivalent of three years' net pay of the applicant. The Tribunal

may, however, in exceptional cases, when it considers it justified, order the payment of a higher amount of

compensation. A statement of the specific reason for such an order shall be made."

(v) The Applicant claims that his is "clearly an exceptional case" for which the Tribunal should exercise its discretion to award a higher amount of compensation for the continued discrimination he suffered on the grounds of his race and nationality.

(vi) The Applicant's claim for salary and benefits is based on his stated inability to obtain another suitable employment and the refusal of the Respondent to give him a reference.

(vii) The Applicant's claim for stigma damages to his professional reputation is based on the (English) House of Lords decision in Malik v BCCI, which he says established the principle that damages can be

awarded on that ground if the employer's breach of his or its contractual duty results in a handicap in the job market.

(viii) The claim for injury to feelings is based on the (English) Court of Appeal decision in *Hugh Martins v Mohammed Choudhary*, which he says laid down the principle that the quantum of damages should reflect the aggravating features of an employer's conduct as they have affected the claimant.

(ix) For exemplary damages, the Applicant relies on the (English) House of Lords decision in the case of *Rookes v Barnard*, which gave guidance for United Kingdom courts regarding the kinds of circumstances which may justify an award of exemplary damages.

(x) In respect of damages for loss of his intellectual property, the Applicant refers to his inability to retrieve materials that had been stored on the Respondent's computer, specifically two pieces of work which pre-date his employment with the Respondent; they are his publication on the Public Complaints Commission and Bureaucracy in Nigeria and Public Sector Management in Africa. In addition to that, the Applicant claims that he has lost up to three years' worth of work in research.

2. The Respondents in their submissions on Remedy contended that the principles of international administrative law require the Tribunal to award an amount of compensation that puts the Applicant in the position he would have been in had his contract been performed. Therefore, the Applicant's claim for £686,075.17 is manifestly in excess of the maximum award of three years' net pay as provided in Article X of the Statute of the Arbitral Tribunal of the Commonwealth Secretariat. The Respondents further contend that there is nothing exceptional about this case to justify such an award under Article X of the statute which is quoted above.

3. Furthermore, the Respondents argued, the Tribunal did not find that the decision made by the Respondents not to renew the Applicant's contract was based on race or nationality. The Phillips Investigation Panel's report on which the Tribunal has relied in coming to its own conclusion, stated that "we find accordingly that any suggestion in Professor Ayeni's allegation of racially based discrimination has not been substantiated,"

4. Regarding the claim by the applicant that the case is an exceptional one, the Respondents submit that there are no exceptional reasons to justify a departure from the ceiling of three years' net pay as provided in Article X. They refer to "The Law of the International Civil Service (2nd Ed, 1994) by Dr Amerasinghe and the Dearing case (UNAT judgment 200 [1975]) to demonstrate what is meant by the phrase "exceptional case" in Article X of the Statute. In Dearing's case the UNAT departed from its two-year compensation limit because they considered that case an exceptional one in which Dearing's fixed term contract of service had been illegally terminated for disability incurred while in the service of the United Nations and for which Dearing had had a legitimate expectancy that his contract would have been renewed.

5. On the issues of (1) material injury; and (2) loss of chance of renewal of contract, the Respondents submit, "the general principle governing compensation for the non-renewal of contract claim is to place the complainant in the same position that he would have been in had the breach not occurred." In the instant case, this means that the Applicant's loss should be treated as the loss of an expectation or chance of renewal of his contract for a further three years; and the Applicant must give credit for the earnings that he has, or could have made from other employment before the end of that three-year period.

The Applicant must therefore act reasonably in mitigating his loss. These principles were expounded in the case of *Dicancro* (Judgment No. 427 [1980] (PAHO)) and reiterated in the ILOAT's judgment No, 2678 of February 6, 2008 (ICC).

6. The Respondents therefore submitted that the Applicant in this case must take all reasonable steps to obtain alternative employment. The same point was made by the ILOAT in the case of *Rosecu* (ILOAT No. 431 (IAEA) judgment of 11 December 1980, where it was held : "These are not adequate reasons for allowing his claim in full... the complainant is not necessarily deprived of all means of livelihood."

7. Regarding the expectation of a renewal of a fixed term contract, the Respondents contrasted this case with *Dicancro's* case and submit that this case should not be put on the same footing as that case since the Applicant's career has not been destroyed by an act of personal revenge and therefore full financial compensation should not be given.

8. The Respondents submit that had the proper review procedure been followed, the prospect of renewal of the Applicant's contract would have been 50%. They argue, therefore in accordance with the principles of International Administrative law, the Applicant should be awarded compensation based on 50% of his 'net pay' over the three years. From this amount, they suggest, an appropriate sum must be deducted to reflect mitigation of loss had the Applicant reasonably and actively sought alternative employment rather than the meagre £2,625,00, which the Applicant has shown as his earnings since leaving the employment of the Respondent. Referring to Dr Amerasinghe's work, the Respondent has submitted that the level of interest will depend on the market rates and the base English rate being 5%, that should be the rate of interest. Further, they argue that in accordance with general principles, interest on loss of earnings should be calculated from the mid-point between the date of the [Applicant's] submission and the date the Applicant's contract terminated. Accordingly the Respondents calculated that the total compensation for loss of 'net pay' and interest should be £33,088.51 plus £1,268.25 interest or a total of £34,356.76.

9. On the question of the claim for increases in salary of 4.6% per annum, the Respondents submit that the actual salary did increase on 1 July, 2007 but that future salary increases cannot be assumed.

10. Similarly, with regard to gratuity the Respondents submit that calculated at 15% of actual gross salary over the three years, the total gratuity plus interest will be £8,728.75. As to vacation leave entitlement, the payment for annual vacation leave is included in the annual salary of employees of the Respondent and is not a separate payment. Furthermore, when a member of staff leaves, the Respondent's Rules state clearly that only 30 days' untaken leave may be compensated for; anything over 30 days will be forfeited.

11. With regard to the claim for children's education allowance, the Respondents state that it was never claimed by the Applicant therefore it is not a loss for which the Respondents are responsible.

12. The Respondents do not object to the payment of repatriation costs to the Applicant to the point of recruitment, or the costs of sea transportation of personal effects and insurance thereon. They do not object to paying the Applicant for Home Leave fares but point out that the Applicant's home country is Nigeria and not South Africa and therefore the fares would be to the former country under the Rules, rather than the latter. Further, the Respondents say that they could make those arrangements for the Applicant at discounted rates through the Respondents' authorized travel service supplier.

13. Regarding compensation for "stigma" and injury to feelings, in reliance on the case of Dicancro ILOAT judgment No. 2524 and the observation of Dr Amerasinghe at page 477 of his work already cited, the Respondents submit that the Applicant's analysis and claim for £140,000.00 plus interest, is greater than the net pay and, as such, should be disallowed. According to Dicancro, an award for 'material and moral damage' is made in serious cases and depends on the gravity of the injury caused; but in this particular case, no such injury is caused.

14. The Respondents' submission on exemplary damages is that the compensation is measured against the 'injury' sustained by an Applicant and should not be used to punish the Respondents for their conduct. The circumstances would have to be truly exceptional but such a situation is far removed from the instant case.

15. With regard to the claim for compensation for loss of intellectual property, questions have been raised as to whether the work was carried out during official working hours and as to why they were stored on the Respondents' computer.

16. As to legal costs, the Respondents submit that the costs sought by the Applicant are unreasonable, and not warranted by the circumstances of the case as the case has been dealt with on written submissions and not on oral argument.

17. The Applicant's claim for a personal apology from the Secretary General, the Respondents submit, is not within the jurisdiction of the Tribunal and they rely on *In re Bartolomei de la Cruz*, ILOAT Judgment No. 2058

18. The Respondents concluded by submitting that an appropriate award would be £35,088.51 in compensation, and the sum of £7,500.00 plus VAT for the Applicant's legal costs.

19. In his response to the Respondents' submissions on remedy, the Applicant, at the very beginning, asserted that the issue of discrimination in his case is a key point of the claim and goes to the heart of the issues and he therefore asks the Tribunal to consider it. Further, he submitted that the Tribunal's decision

setting aside the decision not to renew his contract means that it should have been renewed. Therefore, on the basis of Article X of the Statute of the Tribunal of the Commonwealth Secretariat, he should have been allowed to continue in his job until 30 September, 2009, and, in addition, that he should receive compensation for his loss of earnings for the period since his “dismissal”, plus compensation for further injury sustained. In his submission, the fact that it would have been impossible for both him and the Secretary General to work together if he had returned to his position as head of Department for GIDD makes this an ‘exceptional case’.

20. The Applicant also submitted that there have been very few cases where there has been such blatant discrimination and abuse of power by the head of an international organization. On the question of discrimination, he relied on the decision in Dearing’s case and on it being an exceptional case, he relies on Dhawan (UNAT Judgment No. 247 [1979])

21. On the question of the Applicant’s chances of having his contract renewed, the Applicant submitted that the Respondents’ reliance on ILOAT judgment No. 2678 of February 6, 2008 (ICC) is irrelevant in light of the Tribunal’s own observation in the Applicant’s case, that staff should normally serve two three-year contracts under that policy and also found that the decision to offer the Applicant only a one term contract was “an express departure” from the Respondents’ own normal rotation policy when all the previous twelve directors were given a second contract. The Applicant pointed out that the Tribunal also found that he was entitled to be considered for a second term and the Respondents’ contention that because of his lack of management skills, he was offered a one-term contract does not stand as in that case, the Respondents should have appointed the other candidate who was found to have better management skills than the Applicant.

22. The Tribunal, however had found that the weight of evidence before it showed that the management skills of the Applicant were not less than effective and in fact exceeded the standard required. Therefore, the Applicant submitted, the assumption should be that his contract would have been renewed had a proper review taken place.

23. Regarding reasonable mitigation, the Applicant’s claim is that notwithstanding the refusal by the Respondents to give him a reference, he has done all that he can reasonably be expected to have done to mitigate his losses; therefore, he should be awarded compensation based on 100% of his net pay for three years. In support of his case that he has only claimed net pay and not gross pay, the Applicant has annexed samples of his more recent pay slips which show that he received a total of £5,861.60 + £250 per month as ‘net pay’.

24. The Applicant accepts the Respondents’ argument with regard to vacation leave entitlement and gratuity so that there is a consensual position regarding those two items.

25. Regarding compensation for ‘stigma’ and injury to feelings, the Applicant submits that the facts of his case are similar to those in Dicancro. He contends that the applicant in Dicancro’s case was accused of being incapable of doing his job and the tribunal in that case found that that contention was totally unfounded, which is similar to the position regarding the Applicant’s competency in this case. A further point of similarity between the two cases, he submitted, is apparent because in Dicancro’s case the applicant was given a letter stating that unless he apologized to his Director General, he would receive nothing more than a factual reference and there is a similar demand in this case.

26. With regard to his claim for loss of intellectual property, the Applicant submits that despite repeated requests he was never given access to the computer on which the information was stored.

27. The Respondents, in their Rejoinder on the question of remedy, reminds the Tribunal that its primary responsibility is to determine the appropriate remedy. Among other things, the Respondents state that neither the Tribunal nor the Phillips Investigation Panel found racial discrimination as the ground for the non-renewal of the Applicant’s contract.

28. The Respondents also point out that the Tribunal did not find that the Applicant’s contract should have been renewed and that the best that could be said was that there was only a 50% chance of renewal of the Applicant’s contract even had the proper and fair procedure been followed. The Tribunal, they argue, should therefore not equate the case of Dearing with the Applicant’s as in that case there was an express finding of discrimination (on the ground of disability). The Dearing case was, in their view, clearly an ‘exceptional’ one justifying an award above the normal compensation cap. Similarly, Dhawan is not

applicable as the facts in that case are very different and the actual losses clearly exceeded the compensation cap because of the misrepresentation as to pension entitlement.

29. As to mitigation, the Respondents' submission is that the applicant has mentioned only a single potential employer and he has not provided evidence of his attempts to find work.

30. The Respondents contend that the Applicant's 'net pay' should be used as the basis for compensation. In this connection, they refer to the Applicant's appointment letter dated 26 August, 2003, in which the Applicant's net salary is shown as £42,708. That letter was signed by the Applicant to indicate his acceptance of the terms and conditions of the appointment. Therefore, it would not be appropriate to compensate the Applicant for the additional sums as they are not part of the net pay in any meaningful sense of the word but are specific allowances.

31. As to compensation for 'stigma', 'injury to feelings', etc., the Respondents draw a distinction between this case and that of Dicancro. The tribunal in the Dicancro case found that the Director General had resentment against Dicancro for standing as a rival in an election but in this case there is no such personal resentment.

32. Regarding intellectual property, the Respondents' submission is that the Applicant was offered access to the computer but he did not take it.

Analysis of the relevant issues and the Tribunal's award.

33. We turn now to consider the merits of the Applicant's claims and the Respondents' defence in light of international civil service law.

The General Nature of Remedies in International Administrative Law

34. Different international administrative tribunals have developed different approaches in dealing with the issue of remedies. It is therefore difficult to extract any principles of general application to all tribunals or to find the existence of rules that underlie the granting of particular remedies or combinations of them. There is also no uniform approach in the drafting of the Statutes of various international administrative tribunals so that there is no uniformity of approach in those Statutes to the issue of remedies.

35. Dr Amerasinghe in his work previously cited notes, however, that an examination of the case law of many international administrative tribunals would suggest that there may be some general principles that underlie the granting of remedies by those tribunals, their choice of remedies and the exact dimensions of the remedies, which could be relevant to the decision of cases that come before them.

36. One principle that may be distilled from the cases is that, in general, the tribunals have tended to tailor remedies to the facts of the particular cases which they are called upon to decide as justice may not be fully served if there is too rigid an insistence on uniformity in the application of particular remedies. Furthermore, in the absence of special circumstances, the nature of the remedies awarded is usually linked to the express terms of the Statute of the particular Tribunal. It is therefore not uncommon for a Tribunal to award a lump sum without allocating any part of it to a specific head of claim. For example, the United Nations Appeal Tribunal Statute limits compensation to two years' net salary whereas the World Bank Administrative Tribunal (WBAT) has a ceiling of three years' net salary and the International Labour Organisation's Administrative Tribunal (ILOAT) Statute contains no limit on compensatory awards. The relevant provision in the case of the CSAT is to be found in Article X.1 of its Statute, which provides that the Tribunal "shall fix the amount of compensation ...for the loss, injury or damage sustained, provided that such compensation shall not normally exceed the equivalent of three years' net remuneration of the applicant". Nothing, in the Tribunal's view, would seem to turn on the meaning that should be given to the precise word used to characterise what may be included in compensation, whether 'salary', 'pay' or 'remuneration', as these words are often used interchangeably to mean the same thing.

37. Dr Amerasinghe therefore suggests that it would be sufficient for a Tribunal to deal with remedies under the heads of claim identified by the parties themselves.

38. In this case, the parties have identified eight heads and we think it is convenient to deal with the claims under those heads in the same order in which the parties have dealt with them.

The Tribunal's award

(a) An 'Exceptional Case'?

39. Dr Amerasinghe notes at page 448, of Volume I of his work cited earlier that the tribunals have sometimes ordered compensation in addition to holding that the impugned decision should be annulled, rescinded or that the contract should be specifically performed. The award of additional sums by way of compensation in such cases, it appears from the cases cited by Dr Amerasinghe, has been ordered “where the wrongful action of the respondent [employer] is regarded as having caused additional damage to the applicant”.

40. In the case of the CSAT, Article X.1 of its Statute limits an award of compensation to an applicant, whose case is “well-founded”, to the equivalent of not more than three years’ net remuneration of the applicant for loss, injury or damage sustained by an applicant. This provision is not mandatory but rather gives a discretion to the Tribunal to award up to three years’ net remuneration’, depending on the circumstances of the particular case and applicant.

41. Where, however, the Tribunal finds that the case is an “exceptional” one within the meaning of Article X.1, that Article empowers the Tribunal to order the payment of a higher amount of compensation and, if the Tribunal decides to make such an order, it must give specific reasons for doing so.

42. Now, the CSAT Statute does not define what is an ‘exceptional case’ for its purposes so it is left to the discretion of the Tribunal to make a decision, based on evidence which satisfies it that it is more probable than not, that there has been, for example, an abuse of power. An abuse of power, in the judgment of the Tribunal, would include impermissible discrimination on the ground of illness, race, nationality, religion, disability, or for personal revenge, (these examples are intended to be illustrative, not exhaustive). Dicancro’s case is an example of personal revenge by the Director General because Dicancro had run opposite him in an election. In the case of Dearing it was discrimination on the basis of disability consequent on an illness contracted while in service to the United Nations.

43. In Dhawan’s case, the exceptional circumstance was the proven misrepresentation by a person in authority of the employee’s right to participate in the United Nations Staff Pension Fund.

44. In this case, the only ground advanced on behalf of the Applicant as a basis for treating the Applicant’s case as an ‘exceptional’ one for the purposes of Article X.1 and to cause the Tribunal to exercise its discretion to award compensation over and above three years’ net pay, is the alleged discrimination by the Secretary General against the Applicant because of the latter’s race and nationality. If the Applicant had adduced evidence either to the Phillips Investigation Panel or this Tribunal when it was dealing with the issue of liability to show, on a balance of probability that the Secretary General had been so motivated, then he may have been entitled to succeed on that basis. The difficulty for the Applicant is that the Phillips Investigative Panel, before which he had the right to examine witnesses, referred to that allegation against the Secretary General and concluded at paragraph 50 that, “We find accordingly, that any suggestion in Professor Ayeni’s allegations of racially-based discrimination has not been substantiated.”

45. And at paragraph 17 of the judgment of this Tribunal delivered on 12 October, 2007, the Tribunal stated -

“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.”

46. In these circumstances, we conclude that the Applicant’s claim of exceptional case based on the allegation of discrimination on the ground of his race and nationality has not been proved. It follows, therefore, that as that was the only basis on which the claim that his case falls within the exceptional class in Article X;1, that claim fails.

(b) Loss of Legitimate Expectation of Renewal of Contract:

47. In our judgment delivered on 12 October, 2007, having considered the evidence and arguments presented by both parties, we noted at paragraph 54, that, “the decision not to offer a second contract to the Applicant was not taken following an appropriate review procedure by the Management Committee 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.”

Consequently, the Tribunal found, at paragraph 55, that the decision not to renew the Applicant’s contract was not lawfully taken and on the basis of which that decision was set aside.

48. It is not contested by the Respondents that in those circumstances the Applicant is entitled to compensation for the loss of that expectancy. However, the Respondents contend that the Respondent had only a 50% chance of having his contract renewed even though that fact was unique in the Secretariat since under the Respondent’s’ rotation policy, some twelve persons in similar positions to that held by the Applicant had had their contracts renewed for a second three-year contract. It is not the province of the Tribunal in deciding what remedy to give or the quantum of compensation, to consider what the Respondents may or may not have done had they followed their own rules in this matter.

49. We must consider what loss the unlawful action of the Respondents has caused to the Applicant. The loss to the Applicant is the value of the a new contract for which he was not even considered, although he was entitled to be fairly considered. The net pay for that three-year contract, using the Applicant’s salary at the time of termination of his contract is £219,658.80 (calculated by multiplying his net monthly pay of £5,861.60 + £250 x 12 and x 3). From that figure the sum of £2,625.00 earned by the Applicant in mitigation of damages is to be deducted leaving a total under this head of £217,033.80. Ordinarily, to this sum should be added interest at the rate of 4% on the Applicant’s net pay for the year 2007 as specifically claimed by the Applicant, which would make a total of £219962.58 in respect of loss of pay.

(c) Reasonable Mitigation

50. The Respondents quite rightly contend that the Applicant is under a duty to mitigate his losses flowing from the breach of his contract of employment. However, the Tribunal must consider whether the actions, or lack thereof, by the Applicant in seeking suitable alternative employment is reasonable in all the circumstances of the case. In this case, the Applicant’s explanation for not being able to properly seek and obtain suitable alternative employment, is that he has not been given a reference by the Respondents and he has not been permitted to access his contacts as that information is in the control of the Respondent and he is unable to get access to it.

51. The Tribunal has also considered that the Applicant has only given the Tribunal details of one approach he has made to an international organization for employment, without success as well as the single small mitigation mentioned above. The Tribunal has not been presented with any documentary evidence to suggest that the Applicant’s application for employment was rejected because of the absence of a reference by the Respondents by whom the Applicant has been employed, in various capacities for a considerable period of time. We have been given no details, for example, as to whether there are any other factors which may or may not have adversely affected the Applicant’s ability to obtain suitable alternative employment - in Dearing’s case cited above there was ample evidence before the Tribunal in that case about the whole of Dearing’s experience.

52. The difficulty in this case is to assess by how much the value of mitigation which has not been undertaken to any appreciable extent by the Applicant is to affect the award of compensation to be made to the Applicant. In that regard, we have had no assistance from the Respondents as to the kind of opportunities available in the international arena for persons of the status, age and experience of the Applicant seeking employment without a reference by his most recent employer.

53. In all the circumstances we find that it is more probable than not that the Applicant would be unable to obtain suitable alternative employment without a reference by the Respondents. In the absence of any other concrete evidence to the contrary, we are therefore not minded to make any further deductions from the award for lack of reasonable mitigation.

(d) The Applicant’s Losses (including salary and benefits)

54. The Respondent submits that the net pay of the Applicant should not include allowances such as rent, education, expatriation allowances. Alternatively, they submit that if it is decided that those allowances should be treated as part of the net pay of the Applicant, then they should be treated in the same manner as his net salary, that is, 50% based on the 50% per cent chance of renewal of contract had the proper procedure been followed.

55. The case of de Merode, WBAT Reports (1981) Decision No.1, examines whether certain rights set out in the contract of employment constitute acquired rights and therefore amount to conditions of employment which cannot be unilaterally altered by the Respondents.

56. In the case of Djoehana (No.2) (ILOAT judgment No.538 [1982] UNESCO) the ILOAT held that salary for the compensation ordered by it in an earlier case (involving the same staff member) was net salary payable after the staff assessed tax is deducted and the salary adjustment is the allowances paid in consideration of certain factors taken into account depending on the country or city in which the staff member works. It was held that it did not include dependants' allowances or temporary personal allowances.

57. In Rombach (ILOAT Judgment No 460 [1981], the issue was what was included in the concept of 'total net remuneration' for the purpose of determining whether a staff member's remuneration had been reduced on the assignment of a higher grade on promotion. The ILOAT held that although the relevant staff regulation did not give a formal definition of 'total net remuneration', it should be taken to mean basic salary and such allowances and benefits as are payable after the deduction of internal tax." The tribunal stated, however, that the balance of the arrangements for equitable remuneration ... would be upset if total remuneration' for the purposes of the staff regulations were taken to include all benefits and allowances, without distinction as to their nature and purpose and the terms on which they were payable. Among other things, it held that:

"The purpose of the safeguard in Article 49 ... is to preserve mutual trust. The staff member should be in a position to know what remuneration he may expect over the long term. The list of benefits and allowances in Article 67 .. is not exhaustive. Other provisions of the Staff Regulations confer entitlement to benefits and allowances in other circumstances. They appear to fall into two groups:

benefits and allowances which are permanent or at least payable over a fairly lengthy period, such as residence allowance, allowance for dependants, education benefit, expatriation allowance and language allowance;

temporary benefits and allowances, payable for a limited period, such as the installation benefit, overtime pay... shift work...

The preservation of mutual trust and, consequently, the safeguard provided in article 49 ... are applicable only to allowances which are permanent or payable over a certain period of time. To depart from that principle would be to create unacceptable anomalies in the structure of remuneration at the EPO [European Patent Organization]. The duty allowance is a temporary one. The staff member who receives it knows that he will continue to do so only as long as he is performing duties pertaining to a higher grade..."

58. These cases suggest that benefits that are permanent or payable over a lengthy period may be included in the concept of 'total net remuneration' while temporary benefits and allowances such as overtime payments and duty allowances are not. Dr Amerasinghe points out that the elements to be taken into account in arriving at the meaning of the term salary or remuneration, and it might be added 'pay', may vary, depending on the purpose for which a definition is sought as the two cases just cited demonstrate.

59. In this case, the Respondent does not contest that education allowance (if claimed) would form part of the Applicant's net pay and should therefore subject to the same treatment as they have advocated for the payment of net pay for loss of expectancy of a renewed contract. In this case, however, there is no evidence that the Applicant ever claimed any education allowance and therefore we hold that he has not lost any such allowance as that had to be specifically claimed as it fell due.

60. With regard to the gratuity, the Respondents accept that gratuity is payable on the gross salary earned over the duration of the contract at the rate of 15%. In this case that sum as calculated by the

Respondents in paragraph 40(i) of their Reply on the Question of Remedy is £33,653.03. The Respondents however submit that the Tribunal should award £8,413.26 which would be the equivalent of compensation for loss of gratuity for 1.5 years at £11,217.68 per annum x 50% together with interest on that figure at 5% per annum for 0,75 years x £8,413.26 + £315.50 = £8,728.75.

61. Although we do not accept that the gratuity of £33,653.03 should be reduced for the same reasons we did not agree (in paragraph 49) that the net pay should be reduced, we doubt whether gratuity can be said to be part of the salary, remuneration or pay as such within the meaning of Article X.1, especially given that the Applicant did not actually remain in post for the three years to earn the gratuity, albeit due to no fault of his.

62. With regard to the Applicant's claim for leave pay, we accept, as the Applicant has also accepted, the Respondent's submission that that is in fact part of annual pay so we make no award in respect of the sum claimed for that head of loss.

63. The Respondents do not deny that the Applicant would have been entitled to Home Leave Fares to Nigeria for which the Applicant has claimed the sum of £7, 752.00. That sum would therefore normally have been added to the award to the Applicant but in view of our reasoning in paragraph 61 we hold that this amount does not form part of the remuneration.

64. The Respondents also accept that the Applicant is entitled to his repatriation costs inclusive of business class tickets for him and his family members as well as excess baggage costs and sea transportation and insurance costs for his personal effects to the country of his recruitment which is South Africa. The Respondents have indicated that they are willing to make the necessary arrangements for the Applicant which could be done at a discount using the Respondents travel services providers. The Applicant, however, will have none of their assistance, and perhaps understandably so, bearing in mind how he feels he has been treated by the Respondents. This is a question not of what the Applicant wants but what his contract of employment provides. The cost of repatriation is a cost the Respondent, in any event, would have to bear, regardless of the number of contracts the Applicant may have served. Although Rule 81 of the Staff Rules speaks of the country of a staff member's nationality as the 'country of home leave', it is not clear whether the same applies for repatriation purposes.

65. However, in the circumstances of this case, if the Applicant decides to return to South Africa, from where apparently he was recruited, and the Respondent is agreeable to this, the Applicant should then, within a reasonable time, say two months from the date of this judgment, send the Respondents a proper invoiced bill, within the financial limits allowed by the Rules, for his repatriation, showing the costs including for air tickets and bills of lading for the shipment of his personal effects, which the Respondents must pay. In making this decision, we bear in mind the fact that the cost of travel is presently increasing at an unprecedented rate.

(e) Compensation for 'stigma' and 'injury to feelings'

66. While the Tribunal accepts that in an appropriate case, an award may be made for 'stigma' and or injury to the feelings of an employee whose contract of employment has been terminated or who has been treated in such a manner as to adversely affect the employee's ability to find suitable alternative employment, in this case, there is no evidence before the Tribunal to justify the award of any sum under either of those heads - compare the position in Dicancro's case where there was adverse publicity impugning Dicancro's integrity. In this regard, the Tribunal is not moved, and will not be moved by an appeal to the precedent it will set by its decision on the facts of a particular case based on the evidence presented in that case.

(f) Intellectual Property:

67. We note the Applicant's claim for loss of his personal intellectual property which was stored on the Respondents' computer and which, he says, he has not been able to retrieve because he has not been allowed access to that computer since he was suspended from his job. The Respondents contend that the Applicant could have had access to the computer if he had asked for it but they also question whether that information was placed there during official working hours.

68. In our judgment, the Respondents cannot be held responsible for the loss of property about which they had no knowledge that it was in fact in their possession. We therefore make no award for that loss.

(g) Legal Costs

69. The issue of costs is separate from those of remedy and compensation. The Tribunal is empowered by Article XII.1 and 3 of its Statute, to determine who shall bear the costs of a particular application and in doing so it may take into account the means of the parties. The Tribunal is not bound by the national practices of member nations - for example, English law and practice under which the losing party should be ordered to pay the costs of the winning party.

70. Bearing in mind the means of the parties, we agree and would be content to order that the Respondents should pay the Applicant's reasonable costs.

71. The Applicant has claimed the amount of £750.10 for his 'personal expenses' incurred in pursuing his claim before the Tribunal. The Respondents have not questioned the validity or the reasonableness of that claim.

72. The Applicant has also claimed £65,000.00 as his legal costs reasonably incurred in pursuit of his claims against the Respondents.

73. Under cover of a letter dated 16 April, 2008, the Solicitors for the Applicant sent a Schedule of the Applicant's legal costs up to and including 21 March 2008 showing a total sum of £45,209.69 inclusive of VAT @ £6,733.36 which is substantially less than the £65,000.00 originally claimed. The difference is explained by the Solicitors in the covering note which indicates that the additional sum was for the anticipated oral hearing. That document was not supported by copies of bills seen by the Tribunal apart from the Applicant's Solicitors' Schedule of Legal Costs sent to the Tribunal under cover of a letter dated 16 April, 2008.

74. That schedule was copied to counsel for the Respondents who had previously requested details of the sum of £65,000.00 claimed. In their Rejoinder on the Question of Remedy, the Respondents, at page 10 to 11 argue -

"The Applicant has repeated at paragraph 39 the submission that the charging rates are not excessive given 'the limited number of lawyers in the UK who would be equipped to deal with such a claim'. With the greatest respect to Mr Underwood, there is nothing in the Applicant's various pleadings and submissions on liability and remedy that indicate any particular expertise in the field of international administrative law. Indeed, the only international administrative law cases which have been referred to at any stage by the Applicant, are those that the Respondent referred to in its Submissions on Remedy. It is also not understood how it can possibly be suggested that the junior fee earners only dealt with the 'routine elements of this claim', when their name was on the pleadings (each of the Application, the Applicant's Replies, and the Further submissions by the Applicant were signed by Ms Elish McKee, then a Trainee Solicitor."

75. On two previous occasions the Respondents had offered to pay the sum of £7,500.00 plus VAT for the Applicant's legal costs.

76. While we accept that there is merit in the Respondents' argument that it appears that little work was done by the solicitors in researching the principles of international administrative law applicable to this case, it is nevertheless clear that some work was done in preparing the documents for the case on liability as well as the case on remedy, not only by the Senior Partner but also by a junior and that the bulk was done by a trainee solicitor. However in the absence of objective evidence as to the legal costs, we would only award a sum that we consider reasonable in light of the documents presented before us.

77. We think that we should only allow reasonable costs and the costs charged by the solicitors to the Applicant seem quite high and somewhat unnecessarily so bearing in mind all the circumstances of this particular case and the apparent lack of research on international administrative law.

(h) Non-financial Remedy:

78. The Applicant seeks a written apology from the Secretary General of the Respondents, which, it is contended, has not been given. In addition the Applicant avers that the Respondents have refused to give him a reference: the Respondent's position is that they will only give the Applicant a 'bland' or 'factual' reference unless he complies with their pre-conditions - presumably a written apology to the Secretary General and a request for a good reference.

79. The Respondents submit that the Tribunal has no jurisdiction to order the Respondents to give the Applicant a good reference or a reference at all or to require the Secretary General to make a written apology to the Applicant. That may or may not be so; we make no decision on that submission as that

would require careful consideration and a thorough investigation of the law which has not been presented to the Tribunal in this case.

80. However, as the Applicant was successful in his principal claim that he was wrongfully denied the chance of a renewal of his contract, it would be legally and factually wrong for the Tribunal to now suggest that he should apologize to the Secretary General.

Conclusion

81. We must now, in light of all of the above, decide how much we believe it would be appropriate and reasonable to award the Applicant as compensation and costs.

82. Firstly, it is important to emphasise that we are bound by and cannot ignore the overriding provisions of Article X.1 of the Tribunal Statute which limits the amount the Tribunal can award as 'compensation' to not more than the equivalent of three years' net remuneration. We note that the Tribunal may, in 'exceptional' cases award a higher compensation if it considers a higher award justified in all the circumstances.

83. Secondly, we note also that in both the cases of an award of three years' net remuneration and an award of higher compensation in 'exceptional' cases, the powers of the Tribunal are discretionary and not mandatory.

84. The Tribunal feels that had the Applicant made serious and determined efforts to find alternative employment without success and had produced appropriate evidence to that effect, the Tribunal would have been minded to award him higher compensation.

85. We must, in addition, be mindful of the very limited resources at the disposal of the Commonwealth Secretariat as an organization that is dedicated to providing very much needed technical assistance to its member countries many of which are highly indebted poor countries (HIPC).

86. In the result, and for the reasons that we have given immediately above as well as under the various heads identified by the parties, we award the Applicant compensation equivalent to one and half years' net remuneration for loss of earnings. This would amount to £109,981.29, being the equivalent of 50% of the amount of £219962.58 indicated in paragraph 49 above.

87. Concerning costs, as noted above in paragraph 69, this is separate from the issue of compensation. In this regard, we take cognizance of Article IX.3 of the Tribunal Statute under which the Tribunal may take into account the means of the parties. The Tribunal believes that a round sum of £15,000.00 would be a fair amount to allow the Applicant for costs, out of which the Applicant and his lawyers must meet any liability for VAT.

88. The result therefore is that the amount of the award to the Applicant in respect of compensation and costs is £109,981.29 for the former and £15,000.00 for the latter making a total of £124,981.29.

Given on this 22nd day of August 2008

Signed

Justice R A Banda SC, President

Dame Joan Sawyer DBE, PC

Justice K M Hasan