

**THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL**

**IN THE MATTER OF:**

**C H**

**Applicant**

**and**

**THE COMMONWEALTH SECRETARIAT**

**Respondent**

Before the Tribunal constituted by

Mr Christopher Jeans Q.C. President

Mr Justice Seymour Panton, OJ, CD member

Mr Dheerendra .Kumar. Dabee SC member

---

**JUDGMENT**

---

## **INTRODUCTION AND OVERVIEW**

1. The Respondent maintains a library and archives. The Applicant, CH, headed these operations.
2. In around May 2009, disputes broke out between Ms CH and one of her library staff, Mr KD. Each complained about the other. Attempts were made to resolve the matter informally by means of “tea and cakes” diplomacy. These attempts were unsuccessful. In December 2009 Mr KD brought a formal complaint against Ms CH. She (almost simultaneously) brought a cross-complaint against him.
3. Issues soon arose as to the proper procedure. CH considered that the disciplinary procedure (rather than the grievance procedure) should be used in relation to her complaint against KD. She contended that KD’s complaint against her should be dropped because it was not processed within what she argued was the correct timescale. The Respondent did not agree. It decided that, in the first instance, there should be a single investigation of the complaint and cross-complaint under the grievance procedure. It ultimately opted for the version of the grievance procedure applicable to harassment cases. It appointed an external investigator.
4. Ms CH challenged the procedural decisions taken. She challenged the investigator’s view that the grievance procedures were not legally binding. In late February 2010 she withdrew from the investigatory process. At the same time she launched a fresh grievance about the procedures adopted to date.
5. CH took the view that this grievance should be progressed separately from her original grievance. Having taken legal advice, the Respondent disagreed.
6. What followed was a lengthy “wrangle” about the proper way forward. It lasted until November 2010. Its development was affected by periods of absence on the Applicant’s part: latterly on account of her depression and anxiety. Her depression and anxiety were said to be related matters surrounding the grievance or, as she saw it, the Respondent’s failure to deal with those matters.
7. In October 2010 she returned to work following a long sickness absence. Following her back to work interview she made allegations of bullying.

8. In November 2010 the Respondent announced that there would be a grievance investigation in relation to the outstanding issues between herself and KD. This would be conducted by a new investigator. The Claimant regarded this as unacceptable in the light of previous discussions. She resigned. Her Director invited her to reconsider but she did not.
9. CH complains of "constructive dismissal" and breach of contract. She seeks "rescission of contested decision, damages and costs". The Respondent disputes all her claims.

### **THE PLEADINGS**

10. The application comprises a statement of the Applicant's contentions to which there are 33 annexes attached. It contains very little by way of narrative account, inviting us (in effect) to draw conclusions from the annexed documents. On certain of the annexed documents a line or two of commentary has been inserted. The annexed documents are themselves non-chronological and do not present a complete picture without reference to the Respondent's annexes (for example the Applicant omits her resignation letter). The contentions the Application advances are nonetheless subtle and diffuse.
11. The Respondent's Answer comprises a fairly generalised narrative with legal submissions attaching 20 annexes comprising relevant documents (some of which are also annexed to the Application).
12. The Applicant produced a Reply commenting closely but concisely on individual assertions made in the Answer; and the Respondent produced a similar document by way of Rejoinder commenting on assertions in the Reply.
13. In accordance with the normal procedure of the Tribunal (and in the absence of any request from the parties) there was no oral hearing.
14. The upshot has been that the Tribunal has had to construct its own detailed chronology, cross-referencing extensively between notes and e-mail chains in separate areas of the documentation. Often, the events of a particular day or week have had to be re-constructed through the prism of much later correspondence. The Tribunal has also had to draw inferences from the documents about the precise

course of events. It has had to seek to match up points of complaint with points of response in order to formulate the issues and resolve them, applying the (developing) law of the international civil service.

15. In making these observations, no criticism is intended of either party. The brevity of the respective narratives (together with the diffuse nature of the contentions and counter-contentions) has, however, left the Tribunal with a difficult task.

### **THE FACTS IN MORE DETAIL**

16. CH was appointed pursuant to a letter dated 8th November 2007. It contained the following paragraphs:

"Please note that this contract is for a period of three years in the first instance, which may be renewed subject to mutual agreement according to the exigencies of the service and subject to fully satisfactory performance. It is expected that you will commence duty on 14 January 2008.

This contract incorporates the Commonwealth Secretariat Staff Regulations and Staff Rules as laid down and amended from time to time by member Governments and/or by the Commonwealth Secretary-General.

The summary of terms and conditions of your appointment (Annex II) is attached, which gives a brief outline of the terms and conditions of this contract. A complete copy of the Staff Regulations and Staff Rules can be sent to you upon request.

The pay point for this position is Pay Point H and your salary will be £43,485 (Pounds Sterling Forty Three Thousand Four Hundred and Eighty Five) per annum gross, subject to deductions of National Insurance, and State Earnings Related Pension Scheme (SERPS) contributions and Commonwealth Secretariat Internal income tax paid at UK income tax rates. Your salary will continue to be paid monthly including your appropriate entitlements.

Your attention is drawn specifically to the procedure for settling disputes that may arise in connection with your employment. Under the Commonwealth Secretariat Act 1966, the Secretariat has immunity from suit and legal process. However, the Staff Rules contain a procedure for the redress of any grievance."

17. The Staff Regulations and Staff Rules are set out in what is known as the "Yellow Book" or "Sutherland Handbook". As the opening part of the "Yellow Book", as we shall call it, explains

"The Staff Regulations are made by Commonwealth governments, and can be amended only with their agreement. The Regulations embody the

general conditions of service and the rights, duties and obligations of Secretariat staff. They envisage that the Secretary-General should supplement them by making, and amending from time to time, such Staff Rules consistent with the Regulations as considered necessary. The Rules and Regulations, including any amendments or changes to the Rules as authorised by the Secretary-General in consultation with the CSSA, become part of staff members' contracts of employment."

18. The Yellow Book also contains (in Part I) policy guidance which is said to be "consistent with the Rules and Regulations but does not form part of staff members contracts of employment".
19. Staff Rules 7-9 provide for three procedures, the applicability of which is central to the disputes which have arisen. We quote the rules in full:

### **"7 Disciplinary action**

All staff members shall be subject to disciplinary measures for misconduct, acts or omissions in violation of the Regulations or Rules, or unacceptable behaviour. The Disciplinary Rules and Procedures are set out in Annex 1 and form part of these Rules.

### **8 Contract and administrative grievances**

Staff members shall have available to them a mechanism for the redress of grievances relating to contractual and administrative matters, other than a complaint about termination or a decision not to grant a new contract. The procedures for the handling of such grievances are set out in Annex 2 and form part of these Rules.

### **9 Harassment**

Staff members shall have available to them a mechanism for dealing with cases of harassment. The rules and procedures for this are set out in Annex 3 and form part of these Rules."

#### Discipline

20. We set out below material provisions of Annex 1 (Disciplinary Rules and Procedures).

#### **"Preamble**

- 1 Directors, assisted by their Deputy Directors and Heads of Department/Unit, are responsible for the efficient performance and proper conduct of the staff in their Divisions at all times.

- 2 All staff are required to demonstrate "the highest standards of efficiency, competence and integrity". (1965 Agreed Memorandum).
- 3 This procedure applies to all established staff and supports Directors in meeting their responsibilities at 1 above.
- 4 In the interests of natural justice the procedure requires that a staff member should be made fully aware of any allegations made against him/her, that s/he should have ample opportunity to state his/her case, and that all Directors/Boards operating the procedure should do so in good faith.

### **Conduct subject to disciplinary procedures**

- 5 Certain acts and/or omissions are so serious that, if proved, would destroy the Secretariat's confidence and trust in a staff member and lead to the conclusion that the staff member's employment can no longer be tolerated. These include but are not limited to:
  - ❖ acts or omissions which might bring the Secretariat into disrepute;
  - ❖ allowing private interests to conflict with duties to the Secretariat;
  - ❖ acts/omissions which expose other staff or visitors to serious risk of accident or adverse effect on health;
  - ❖ refusal to carry out reasonable and legitimate instructions;
  - ❖ theft or fraud from the Secretariat, other staff or visitors;
  - ❖ fighting or physical assault;
  - ❖ serious dereliction of duty
  - ❖ intentionally divulging confidential information to unauthorised persons;
  - ❖ demonstrable acts of racial and/or sexual harassment;
- 6 Other conduct which may lead to disciplinary action includes but is not limited to:
  - ❖ repeated unauthorised absence;
  - ❖ poor timekeeping;
  - ❖ abusive or objectionable language or behaviour;
  - ❖ neglect of safety standards, including smoking on premises;
  - ❖ breach of the Staff Regulations and Rules;
  - ❖ breach of finance regulations and/or procedures or making unauthorised commitments on behalf of the Secretariat;
  - ❖ misuse of the Secretariat's IT and other equipment.

If repeated, misconduct of this type will be treated as seriously as the types of misconduct listed in paragraph 5.

### **Procedure**

- 7 All references to a Director in the following paragraphs will mean the Acting Director, if the Director him/herself is not in the office.

### **Conduct of the type listed in paragraph 5**

- 8 Any member of staff becoming aware of conduct of the type described in paragraph 5 shall immediately bring it to the attention of his/her Director. If the case relates to an individual not in the same division the Director shall contact forthwith the individual's Director with all the available facts.
- 9 The individual's Director shall consult the Director Corporate Services or senior member of PSDD, who will advise and assist in any necessary investigation. The Director will subsequently meet with the individual to explain the allegation and give the individual the opportunity to respond.
- 10 If the individual's response is acceptable, no further disciplinary action will be taken. If the response is not acceptable the individual will be informed of the allegation in writing. The Director will suspend the individual with or without pay while a Disciplinary Board is convened.  
[Provision is then made for Disciplinary Boards.] ....

#### **Conduct of the type listed in paragraph 6**

- 19 All staff members are required to:
  - ❖ be ready and willing to work throughout the working day,
  - ❖ use care and skill in performing tasks,
  - ❖ take care of Secretariat property, and
  - ❖ comply with the Secretariat's Regulations, Rules and procedures.
- 20 Where attendance, timekeeping or conduct in these other respects are less than fully satisfactory, the staff member's immediate supervisor shall bring the matter to the attention of the staff member and make a record of the discussion.
- 21 Where a supervisor does not find the necessary improvement after discussing with the individual and allowing a reasonable period for any change to show, s/he should refer the matter upwards.
- 22 The Director, or in cases where the Director has referred the matter to his/her supervisor, the relevant Deputy Secretary-General, will meet with the staff member to discuss the problem and should, at the same time issue a warning letter.
- 23 Should the situation not improve, The Director (or DSG where relevant) shall issue a final warning letter.
- 24 Where a final warning has been issued and the misconduct of which the staff member has been warned has not been rectified the Director shall consult Director, Corporate Services (or Director, LCAD if staff member is in Corporate Services Divisions) with a view to a Disciplinary Board being convened and held in accordance with the procedures outlined in paragraphs 8 to 18 above."

We draw particular attention to the features:

(i) that in order to trigger the disciplinary procedure, the misconduct must be reported to the *Director of the Department concerned*: this is explicit as regards serious misconduct (see paragraph 8 above) and implicit as regards less serious conduct ,where the first report will be to the immediate supervisor (see paragraphs 20-22)

(ii) that a fundamental feature of the procedure is that the “accused” employee should have an ample opportunity to state his or her case (paragraph 4)

Contract and administrative grievance

21. Annex 2 deals with “Contract and Administrative Grievance”. We set out relevant provisions below

- “1 These procedures do not apply to grievances relating to a decision that:
- ❖ probation should not be confirmed; or
  - ❖ a probation period should be extended beyond 12 months from commencement of employment; or
  - ❖ an increment be withheld; or
  - ❖ appointment be terminated.

Such grievances are to be resolved in accordance with the procedure outlined in Annex 4 to these Rules.

**Informal Action**

- 2 Staff with an administrative or contract related problem will, in the first instance, bring such a problem to the informal grievance handling mechanism.
- 3 Complaints on administrative cases will be brought to the person’s line manager, while those related to contract cases will be brought to the Head of Personnel Department.
- 4 The person who receives the complaint has a responsibility to ensure that action is taken on it. This action may either be taken by the person to whom the complaint is brought or, if either the aggrieved person or the person whose action is complained of so requests, by a mediator. The mediator would be selected by both parties with the informal involvement of the CSSA Chairperson.
- 5 The informal mediation process, which will be off the record, will entail the following procedure:
  - ❖ The Mediator will assess the grounds for the complaint in as sensitive a manner as possible.

- ❖ The Mediator will assist the complainant to decide on the appropriate route to proceed with the complaint, including determining and explaining to the complainant whether or not the complaint is within the scope and coverage of Secretariat's staff rules and procedures.
- ❖ The Mediator will hold discussions with the Secretariat official responsible for the action/decision with a view to seeking an explanation or reason for making the decision complained of. This may also involve the determination of whether the action/decisions are underpinned by established policy.
- ❖ The Mediator will seek to give advice to both parties on courses of action which might be available to resolve the situation amicably.

### **Formal Action**

- 6 Formal procedures may only be used where informal procedures have proved ineffective. Where this is the case a written complaint will be addressed to the Director of Corporate Services and shall include details of:
  - ❖ the name and division of the complainant;
  - ❖ the nature of the complaint; and
  - ❖ details of the informal efforts made to resolve the grievance.
- 7 The complainant has a right to be represented by an individual of his/her choice.

### **Investigation**

- 8 Once a formal complaint has been received an investigation must take place in order to find out if a breach of staff rules, procedures or practices has occurred.
- 9 The Director of Corporate Services will write to the complainant and the person whose actions are complained of. In the absence of the Director of Corporate Services the officer acting in his/her place shall issue the letter unless the officer made, or was a party to the making of the decision which gave rise to the grievance. The letter will state the nature of the grievance and the name and division of the officer who will investigate the grievance. The officer conducting the investigation interviews must not have had any involvement with the issue in any capacity.
- 10 The investigation interviews will, subject to the presence in London of all relevant parties, take place within 20 working days of receipt of the written complaint.
- 11 Investigations will take into account the complainant's statement and the response of the Secretariat officer responsible for the subject matter which gave rise to the complaint. Where relevant, the statements of witnesses shall also be considered by the investigator.
- 12 The investigation interviews will concentrate only on collecting information relevant to the complaint.

- 13 The investigator will report his/her findings to the Director Corporate Services.

Provision is then made as to outcomes..The anticipated remedy is

“Rectification of the error/Reversal of the Decision

We draw attention to the feature that this procedure

(i) is expressed to be for “administrative “ and “contract related” problems (see paragraph 2)

(ii) involves the use of a *mediator* (at the informal stage) and the use of an *investigator* (at the formal stage)

(iii) in contrast to the “Harassment “ procedure (below)

- (a) does not involve reference to an EEO Panel
- (b) does not anticipate disciplinary action as an outcome

#### Harassment

22. Annex 3 sets out the Mechanism for dealing with Harassment cases. We set out relevant provisions below:

- “1 The informal channel for resolution of harassment cases shall, unless the offender has previously been warned formally that his/her particular behaviour is offensive and the same behaviour is the subject of the subsequent complaint, be the first process. The action taken will be timely, sensitive and confidential. The formal channel is the only channel which will result in the taking disciplinary action against an officer accused of harassment.

#### **Informal Action**

- 2 The alleged harasser may not always be aware that his or her behaviour causes offence. A personal approach may be all that is needed for the behaviour to stop. If it does that is the end of the matter.
- 3 If the complainant finds it difficult to confront the alleged harasser or if a personal challenge is ineffective in stopping the offender behaviour, the following action may be taken.
- 4 The complaint should be brought to a member of the EEO Panel who will deal with the complaint or arrange for it to be dealt with by another member of the Panel.

- 5      The complainant should:
  - ❖ describe the behaviour and explain why it is seen as offensive and unwelcome;
  - ❖ explain why it makes the person feel uncomfortable and how it can interfere with performance at work; and
  - ❖ ask that the behaviour stop
  - ❖ keep a written record of the time, place and nature of each incident, feelings at the time, response and feedback to the harasser and witness present (if any).
- 6      The steps which can be included in the informal procedure conducted by a member if the EEO Panel include:
  - ❖ Sensitively assessing the grounds for the complaint
  - ❖ Assisting the complainant to decide on the best route to proceed with the complaint.
  - ❖ Explaining to the complainant whether the matter is within the scope and coverage of the Secretariat's policy on EEO.
  - ❖ Mediation, which means having a discussion with the alleged harasser. The alleged harasser should be:
    - asked to explain his/her behaviour;
    - asked to stop the offending behaviour;
    - made aware of the impact of the behaviour;
    - made aware that the behaviour is contrary to the EEO policy;
    - told what the required standards of behaviour would be;
    - informed about the likely consequences of continuing the offensive behaviour; and
    - advised that the situation will be monitored.
- 7      Mediation discussions are informal and confidential and are to be recorded only if the harassment continues or is repeated.

### **Formal Action**

- 8      Formal procedures will be necessary where the informal procedures have proved ineffective.
- 9      Both the complainant and the person whose conduct is complained of have a right to be represented by a member of the EEO Panel.
- 10     The complaint must be made in writing to the Director of Corporate Services and shall include details of:
  - ❖ the name and division of the complainant;
  - ❖ the nature of the complaint;
  - ❖ details of informal efforts made to resolve the grievance;
  - ❖ the frequency and dates of the alleged harassment witnesses; and
  - ❖ the feeling at the time and the effect on the complainant.

### **Investigation**

- 11 Once a formal complaint has been received an investigation must take place.
- 12 The complainant and the person whose actions are complained of will be sent a letter by the Director of Corporate Services. In the absence of the Director of Corporate Services the officer in his/her place shall issue the letter unless that officer is the alleged harasser. The letter will state the nature of the grievance and the name and division of the officer who will investigate the grievance. The officer conducting the investigation interviews may be a member of the EEO Panel or of the CSSA Executive but must not have had any prior involvement with the issue.
- 13 The investigation interviews will, subject to the presence in London of all relevant parties, take place within 20 working days of receipt of the written complaint.
- 14 Investigations will take into account the complainant's statement and the response of the alleged harasser. Where relevant, the statements of witnesses shall also be considered by the investigators.
- 15 The investigation interviews will concentrate only on collecting information.
- 16 If the alleged harasser denies the allegation, the investigator will take into account:
  - ❖ statements of witnesses;
  - ❖ an assessment of the complainant's evidence; and
  - ❖ any information gained from a person who attempted to mediate during informal proceedings.
- 17 The investigation may not take into account:
  - ❖ irrelevant personal comments, judgements or stereotypes of either the complainant or the alleged harasser
  - ❖ and may not make general enquiries to find out if other officers have had similar experiences.

## **Outcomes**

### **Complaint Not Established**

- 18 If a complaint cannot be sustained the investigator shall report to the Director of Corporate Services and to the parties concerned to that effect.

### **Informal Resolution**

- 19 Where the allegation of offending behaviour is established, the matter may be informally resolved where the alleged harasser agrees to stop the offending behaviour. In serious cases the

relevant Director or DSG (in the case of senior officers) shall monitor the situation. Informal resolution will not be available in cases where the offender has been previously formally warned that particular behaviour is offensive and the same behaviour has been repeated.

### **Disciplinary Action**

- 20 Where the investigator concludes that there is sufficient evidence of unacceptable behaviour she/he may recommend that the behaviour be treated as falling under either Paragraphs 5 or 6 of the Disciplinary Procedures annexed to the Staff Rules. Resulting disciplinary action will be taken in accordance with the Staff Rules after the report of the investigator is forwarded to the DSG in charge of the Equal Employment Opportunities Policy, through the Director of Corporate Services.”
23. The Yellow Book also makes reference to the procedures for renewing terms of appointment. Annex 10 to the Guidance sets out information on the number of contracts which members of various grades could expect and on the timing of offers of further contracts. Staff Rule 16 provides that staff members employed on contracts for any period of a year or more shall be informed in writing whether they will be offered a new contract. The Rule continues:

“Such information will, so far as practicable, be given to staff members not later than six months before the date of expiration of their contracts. Where information has not been so given the contract will be treated as having been extended for a period of 6 calendar months after such notice was in fact given”

In CH's case the three year appointment was due to expire on 13<sup>th</sup> or 14<sup>th</sup> January 2011.

24. CH was responsible to the Director of the Communications and Public Affairs Division, E del B. The Deputy Director, ME was her immediate boss.
25. From the end of May 2009 onwards, difficulties emerged between CH and one of her subordinates in the library KD. An early “trigger” was a meeting she had with him when he was seeking a pay rise. CH's diary note records that he became angry when she pointed out that he was unlikely to obtain a pay rise because of his lack of qualifications. CH records herself as having said

“if he did not like the situation he knew what to do”

She records that he walked out at that point. She was surprised. She expressed her disappointment to him in an e-mail.

26. KD responded that she was “constantly, rude and belittling [his] position” within the department. He made it clear he was unhappy about being told that he “knew what to do” if he did not like the situation.
27. Thus began a long series of accusations and counter accusations recorded in the e-mail chains before us.
28. On 2<sup>nd</sup> July KD complained to ME, Deputy Director, that CH had refused to speak to him except in ME’s presence.
29. Attempts were made by management to restore relations. ME’s e-mail of 29th July notes “for the record” the following steps

“Dear E (del B)  
Fatima - For CH and KD files).

C(H), K(D), E and I met last week over management issues in the Library. C(H) and K(D) went over their issues, incident by incident, and agreed to a fresh start.

\*C(H) apologised for a comment that may have been misconstrued to cast aspersions on K(D)’s character. C(H) and K(D) will have a weekly meeting (for an initial period of 4 weeks) and report any issues arising to me.

\*E will arrange tea with cake for the library as an initial bonding event.

\*E will explore a bonding one-day retreat to allow the library staff to explore the various issues they confront and for staff to understand each other’s concerns. She will let us know once a facilitator has been identified and what kind of budget is involved so we can see whether it is doable.”

30. We do not have the full detail of the services which were made available subsequently but they appear from later correspondence (see below) to have included professional counselling services. It appears that a professional facilitator (AM) was involved by the Respondent in October (see below), but we infer that she had no success.
31. The “truce” obtained in late July proved temporary. Over the ensuing months, CH complained that KD was not co-operating or following instructions, was verbally aggressive (and had called her a “horrible old woman”) and was performing unsatisfactorily in various respects. KD’s perception was apparently that CH was

checking up on him unreasonably, failing to communicate with him, allocating work unfairly and making unwarranted accusations.

32. Meanwhile, CH was consulting her doctor over stress at work. A later medical report from her general practitioner Dr. P (dated 23rd August 2010) which she disclosed contains the following passage:

“This lady has been a patient of the Practice since November 1990. She first presented on the 12th August 2009 in the course of consultation for repeat medication she disclosed that she had stress at work and was finding a junior colleague quite difficult to cope with. She was looking forward to her forthcoming holiday and was hopeful that things would be better.”

33. By late November 2009, problems were again coming to a head as CH met with Ms N, HR Officer. In an e-mail of 26 November following that meeting she set out her concerns about KD at length, concluding:

“I feel bullied and the management above me have been complicit in this by their actions”.

34. This latter statement drew concern from the Deputy Director, ME and the Director E Del B. In an e-mail of 9th December timed at 14.39 ME stated that the e-mail to Ms. N largely dealt with operational matters “which we will endeavour to resolve as quickly as possible”. In the meantime, he asked her to elaborate

“on your claim below, which came as a surprise to myself (and I am sure E del B will feel the same):

**“I feel bullied, and the management above me has been complicit in this by their actions”.**

35. Mr E Del B also asked for an explanation for this statement.
36. The e-mail correspondence is rather confusingly organised in CH's Annex 12 but placing the key exchanges of 10<sup>th</sup> December in chronological order they appear to run as follows:

**“17.29: 10th December from CH to EdB and ME**

Dear M and E,

Thank you for your e-mails of 9th and 10th December.

I have been carefully considering my position during the past 24 hours and it is with regret that I have decided to instigate a formal complaint of bullying and harassment against KD.

I maintain that all informal procedures invoked to address the breakdown in my professional relationship with KD have failed to improve the working situation, adequately or at all.

It is unfortunate that I am left with no other option than to pursue a formal complaint through the mechanisms provided in the Sutherland Handbook.

In light of the above, please be advised that I will no longer engage in informal approaches with any staff in relation to this matter, therefore our meeting tomorrow on 11 December at 10.00 is cancelled.

I trust that any issues or concerns you may have be dealt with comprehensively during the formal investigation process.

Regards

C(H)

#### **17.33: from Mr del B**

C(H)

I fully expect you to meet with us at 10am as requested.

E(del)B

#### **18.03: from CH**

E(del)B and ME,

If I were to attend this meeting tomorrow it would only be to confirm that I shall be making a Formal Complaint against KD. I have no alternative as informal efforts to resolve this long standing matter have proven wholly unsuccessful and the situation confronting me is intolerable.

In the circumstances I believe that all matters can only be properly investigated and addressed by way of a Formal Complaint. Therefore I confirm any meeting tomorrow is inappropriate and would add nothing.

C(H)

#### **18.13: From Mr del B**

C(H)

You will have to address the charges you made that management was "complicit" in this matter, which is patently untrue and could be construed as malicious rumour mongering.

Consequently if you do not appear at the meeting tomorrow it will be an act of insubordination and I will be left with no option but to take disciplinary action.

E(del)B

#### **19.09: from C(H)**

E(del)B,

It is by no means a question of malicious rumour mongering. The statement I made was in a confidential email to Human Resources in which I was seeking their assistance to resolve the issue with Keith. I believe that that management has allowed the matter to go unresolved for far too long: hence my comment about complicity. I feel fully entitled to do so and

expect that matters now be investigated under the complaint process. It is for this reason that I believe that any discussion tomorrow would be inappropriate, and I hope that you respect my request. It would be wrong for you to compel me to attend a meeting and to treat it as act of insubordination if I do not do so. I should add that I am disappointed that I have not heard from Manoah subsequent to our meeting on Tuesday as he had promised. Had I heard from him I might have decided otherwise about making a Formal Complaint.

C(H)

#### **20.29: from Mr del B**

C(H)

If the situation has gone on for long it is because we have been working with you and Keith to try to resolve the issues. Including bringing in professional counselling services to assist. If it has gone on for too long it is because you did not file a formal complaint, and hence we were trying to resolve the situation without exacerbating confrontation.

I still expect a full explanation of your statement before I consider taking further action.

E(delB)"

37. It appears that a meeting did take between CH and Mr Del B on 11th December. We only have CH's account of it, interspersed with various e-mails as part of her Annex 12 but it appears that the possibility of disciplinary action was raised. The note contains the exchange "I asked if I was dismissed and he said "yes" and I left the room. We infer that if "dismissed" was used it meant and was understood to mean "dismissed from Del B's presence" rather than from the employment. Otherwise, the rest of the note - and the continuation of the story from here onwards makes no sense.
38. KD submitted a formal grievance against CH on 21st December 2009.
39. On that day, 21st December, EM wrote to CH as follows:

"Dear C(H)

I am writing to inform you that a grievance has been raised by KD regarding your conduct towards him.

The nature of the allegations is as follows:

- Unreasonably checking up on him and criticising his work;
- Unfair allocation of work;
- Lack of communication;
- Unwarranted accusations of intimidating behaviour.

I will endeavour to have this issue resolved as soon as possible and have arranged a meeting to inform you about the process we must follow in accordance with the Sutherland Handbook. The meeting will take place at 2.30pm on Tuesday 22 December 2009 in Quadrant House, Meeting Room 3. Unfortunately, I will be on leave on that date so GG, Communications Adviser, CPAD, will explain the process to you in my absence. PN and P C from HRS will also attend the meeting.

I must point out that no judgment or decision has yet been made on the merits or otherwise of the grievance. You will understand that the Secretariat is under a duty to take all complaints seriously and to deal with them fully and fairly.

I should be grateful if you would confirm your attendance at the above meeting.”

40. On the same day at 16.51, after (as Ms. Hume records in her Annex XI) she had “received” KD’s grievance she submitted her own grievance formally. It is of note that she submitted it not to the Director of her Division Mr Del B but to another Director, Mr CL, Corporate Services Division. It set out the background as follows:

### **“Background**

The current situation regarding the behaviour and management of KD is unsustainable. He takes up a tremendous amount of management time and refuses to move forward even after apologies, the facilitator sessions and many efforts of good will by H, T and myself.

Problems started in May 2009 when KD was aggrieved by my choice of words used to convey a negative decision from Human Resource Services (HRS) following his earlier application for a pay rise. At my request, the Director of CPAD intervened in the dispute and elicited on 28th May, on an informal basis, mutual apologies from both parties.

Unfortunately, KD did not appear to move forward in relation to this matter and on the 3rd July, openly refused a reasonable and legitimate request by myself, and subsequently lodged a complaint against me with the Deputy Director of CPAD, ME.

In order to attempt to resolve this complaint on an informal basis I engaged in a meeting with ME, EL, KD on the 24th July, 2009. During this meeting issues were addressed and both parties again agreed to a fresh start, but the complaint was not directly addressed during the meeting. It was agreed that KD and I would engage in weekly meetings over an initial period of 4 weeks and report any issues to the Deputy Director of CPAD. These one to one sessions broke down after two sessions. In addition member of HRS personnel tried to organise tea and cakes for the library team in order to build camaraderie but it did not happen.

Unfortunately this and other informal efforts failed to result in an improvement in KD's behaviour or work. As a result, the Deputy Director of CPAD engaged a professional facilitator (AM) on 6th October, 2009.

KD openly refuses to fulfil requests made of him from the library team and myself. His manner is difficult, angry and aggressive to both myself and on occasion to H. So little communication is now possible between KD and other members of library staff, regarding work, that the three of us are very frustrated. There is a problem of approachability acutely felt by myself and to some extent by my colleagues H and T. It is not a good working environment when he is present.

If necessary I am prepared to submit to an investigator, in strictest confidence, copy of my diary up to the point of filing this complaint as supporting evidence both of my grievance and of informal attempts to resolve the situation. The diary includes the frequency of incidences, relevant dates and names of witnesses."

Having set out the "background" it then summarised the grievance as follows:

#### "GRIEVANCE

My complaint is twofold:

1. I maintain that KD engages in conduct subject to disciplinary procedures as per the contents of Annex 1, paragraph 5 (page 153 of the Sutherland Handbook) in that he refuses to carry out reasonable and legitimate instructions. The following list of incidences where KD refused to carry out my reasonable and legitimate instructions - see below or attached document.
2. I maintain further that KD engages in conduct which may lead to disciplinary action as per the contents of paragraph 6 (page 13) of the Sutherland Handbook, in that he engages in abusive and objectionable language and behaviour. The following is a list of incidences where KD is engaged in abusive and objectionable language and behaviour see below or attached document

I therefore request that procedures set out at paragraphs 22 to 24 of Annex 1 (page 155) of the Sutherland Handbook are invoked in relation to this complaint. [This is a reference to the disciplinary procedure.]"

It continued by listing a long series of events and exchanges concerning KD over many months.

41. On 22nd December 2009 CH met with Ms. C, HR Officer. The same day she signed off with stress for 6 weeks from 11th January, with an indication from the doctor that adjusting her work schedule might avoid the need for absence.
42. The medical report from her doctor records that she met with the doctor on 23rd December:

“Dear M

C(H) DOB 11/07/1952 NHS NO 628 593 7788  
41 Woodlands Avenue, Finchley, London, N3 2NS

#### **MEDICAL REPORT**

She returned to the Surgery on the 23rd December 2009 when she was experiencing anxiety and depression in connection with problems in the workplace. I assessed her using the Hospital Anxiety and Depression Scale (HADS) her depression score was 11 and her anxiety score was 19 giving evidence of the extent of her distress. I prescribed Propranolol medication to help with the anxiety and I gave her a Certificate to remain off work for four weeks annotating the Medical Certificate to suggest that flexible working might be an option to help her to stay on duty. I understand that Occupational Health was involved at the time and Ms (C)H gave me verbal permission to speak to [MB Occupational Health Adviser] regarding options for decreasing her working day in order to overcome the work related stress she was experiencing. I issued a Certificate Fit for Work on the 21st January 2010.”

43. On 24th December Ms. C wrote confirming to CH as follows:

“Following our meeting on 22 December 2009, I am now writing to confirm what was discussed. GG, Communications Adviser, PN, HRS, and VQ, CSSA, were also present at the meeting.

As outlined in ME’s letter to you dated 21 December 2009, KD has raised a grievance regarding your conduct towards him:

- Unreasonably checking up on him and criticising his work;
- Unfair allocation of work;
- Lack of communication;
- Unwarranted accusations of intimidating behaviour.

As discussed, the Grievance procedure is outlined in Chapter 8 of the Sutherland Handbook. Further to this, we will follow Part Three, Annex 2, Mechanism to Deal with Contract and Administrative Grievances. However, should the grievance be upheld, a decision may then be made to follow Part Three, Annex 1, Disciplinary Rules and Procedures.

As explained to you, the Sutherland Handbook refers to the role of the Director of Corporate Services, however as HRS is no longer part of

Corporate Services, this role is now taken by the Head of Human Resources or the line manager of the individuals concerned, as is deemed most appropriate in the specific case.

As the line manager in the case, ME, Deputy Director, CPAD, will nominate an investigator to carry out the inquiry and advise you accordingly. The investigator will be a staff member from a division other than CPAD. It is intended that the investigation will start week commencing 4 January 2010, as long as all parties are available in London, in any case the start date will be confirmed to you. The investigation will then take no more than 20 working days from that date.

Once the investigation has been completed, the investigator will write a report for M(E) to consider. M(E) will make a decision, based on this report, as to whether the grievance is upheld or not and what action is required. You will then be informed of his decision.

I would confirm that no judgment or decision has yet been made on the merits or otherwise of the grievance. You will understand that the Secretariat is under a duty to take all complaints seriously and to deal with them fully and fairly.

Yours sincerely  
PC  
HR Officer"

44. CH responded on 4th January 2010, indicating that she considered the wrong procedure to have been invoked:

"Dear P

Thank you for your letter of the 24th December that I did not receive until the afternoon of the 4th January 2010 due to the Christmas holidays.

I have carefully considered the contents. As you will recall I expressed reservations at the mechanisms proposed by HRS to deal with KD's grievance during the meeting on the 22nd December 2009. Please be advised again that I do not accept that the mechanism proposed at Part Three, Annex 2 that deals with Contract and Administrative Grievances is correct in this instance.

If you wish to pursue this matter by following the procedures set out at Part Three, Annex 2, then I contend that I am not the subject of any grievance under this mechanism, as I have no involvement in KD's individual contract of employment with the Commonwealth Secretariat. If he has a grievance regarding a contractual/administrative issue, then properly this should be brought by KD against the Commonwealth Secretariat alone.

Yours sincerely,  
CH  
Head of Library and Archives"

45. Ms. C replied on 12th January

"Dear C(H)

I am writing in reply to your letter dated 4 January 2010, regarding the grievance raised by KD, in which you did not accept that the Mechanism to Deal with Contract and Administrative Grievances should be used in this case.

I can confirm that we are seeking further guidance, regarding the Grievance procedure and will contact you again as soon as we have clarification. This means that the start of the investigation process has been postponed and we will inform you of the revised start date as soon as this is resolved."

46. On 15th January 2010 CH wrote to Ms. C, setting out her position formally on the procedure followed. She referred to the meeting of 22nd December and stated:

"... At that meeting, I questioned the mechanism to be applied to this complaint and suggested either Annex 1 Disciplinary Rules and Procedures or Annex 3 Mechanism for Dealing with Harassment Cases. PC and PN retired for consultation and said that Annex 2 Mechanisms to Deal with Contractual and Administrative Grievances would apply. I clarified at that meeting that according to the procedures set out at Annex 2, paragraph 10, the investigation should be completed within 20 days of the lodgement of the original formal complaint. The same timescale applies to the Mechanism for Dealing with Harassment Cases at Annex 3. Nevertheless, because of the Christmas period, I was prepared to be flexible and reasonably agreed that "*the investigation will start week commencing 4 January 2010, as long as all parties are available in London, in any case the start date will be confirmed to you*" as stated in PC's letter of the 24 December.

On 4 January 2010, immediately on receipt of PC's letter dated 24 December 2009, I responded in writing by repeating what I said at the meeting on 22 December 2009, namely that I did not accept the mechanism proposed at Part Three, Annex 2 that deals with Contractual and Administrative Grievances because "*I have no involvement in Mr KD's individual contract of employment.*"

Having referred to the subsequent correspondence she summarised her position thus:

"1. I believe that as far as ComSec's handling of KD's complaint against me is concerned, it is in breach of its own procedures in the following ways: Given that Mr. D's complaint was lodged before the 22 December 2009, the 20 day time limit for the requisite investigation expired before the 11th January 2010. P C's letter referring to a postponement of the investigation was dated 12th January 2010. This is in breach of the original lodgement of Mr. D's complaint.

2. In HR's letter of 24 December 2009, HR said "*the investigation will start week commencing 4 January 2010.*" But HR did not reply to my letter of 4 January 2010 until 12 January 2010 in order to postpone the investigation. This is in breach of the agreed extension due to the Christmas holidays.

Proper procedures have not been followed at all. Despite flexibility on my part, agreements have been broken and appropriate mechanisms as laid out in the Sutherland Handbook have not been applied. Therefore the complaint by KD against me should be dropped. If it is perused, I will have no alternative but to bring a contractual grievance against the Commonwealth Secretariat in relation to this matter."

47. Meanwhile CH had been referred by EL from Human Resources to MB, Occupational Health Adviser. MB saw CH on 15th January and she reported (in a letter dated 19th January) as follows:

"CH told me that she feels that her stress has been caused by a member of her staff. She tells me that this person is "a very difficult person" and that he has been "uncompromising and aggressive", since May 2009, and that since then his behaviour has become worse. On 18.05.09, she discussed her issues with her line manager ME, but does not feel that she has received any support from him. She told me that in October 2009 she lodged an informal grievance, but that there has been no outcome from this. On 10.12.09, she told her Director E del B that she intended to lodge a formal complaint against this employee, however, she did not do this. On 21.12.09, she received a letter to inform her that this employee had lodged a formal complaint against her. I believe that CH is now also in the process of lodging a formal grievance against this employee, and I have, therefore, opted not to give any further information in this report regarding the working relationship issues in question as I believe these will be fully investigated by HR.

CH told me that she is currently experiencing a variety of symptoms which are causing her distress, and feels that these symptoms are caused wholly by her work issues. These symptoms are common when an individual is suffering from stress.

CH told me that she first saw her GP for her symptoms in May 2009 and was prescribed medication for these. She then consulted her GP again on 22.12.09, and was given a sick note. The sick note, a Med 5 form, is slightly confusing in its advice.

It was signed by the GP on 22.12.09, and appears to advise that CH is signed off with work-related stress for a 6 week period from 11.01.10, and states: "Adjusting work schedule might mean that time off is not required (Flexible working)." CH told me that she discussed with the GP that she wished to have the Christmas break off work as planned and to return to work on 04.01.10. She then wished to see if things had improved, and if they had not, then she wished to be allowed to work flexible hours, and to

come into work if and when she felt able. I have contacted the GP by telephone to discuss this unusual sick-note, but have yet to make contact.

I explained to CH that, in my opinion, this was not a suitable solution to the problem, and that if she did not feel that she was able to cope with her normal full-time hours then a more appropriate solution was to reduce her hours in a more structured manner for a temporary period and to monitor her progress regularly and to gradually increase her hours over a 2-4 weeks period, and CH agreed to this and told me that she felt this would allow her to have more relaxation time in the evening and that this would help her cope with the situation.

It is therefore, that I would advise that if CH does not feel fit to maintain her normal hours of work, that she should reduce her hours to 1000-1500hrs, with a 20 minute meal break, and CH feels that she could continue working 5 days per week. CH told me that she occasionally had professional networking lunches and that she would like to continue to take part in these. I would, therefore, suggest that on the days of these lunches that she continues to work for 5 hours, but has a longer meal break as appropriate.

In order to reduce her perceived levels of work-related stress which CH feels have been caused by the breakdown of her working relationship with this member of staff, I would suggest that her tasks are purely operational, and that she is relieved from all managerial tasks of this employee, and if possible, avoids all contact with him until these issues are resolved.

CH also tells me that there have been issues regarding the temperature in the office that she shares with this member of staff. She tells me that she sits close to the heater and that she finds the office temperature comfortable, however the member of staff finds the office is cold, and that there have been quite serious differences of opinion on this matter. I would, therefore, also suggest that, if possible, Catherine is allowed to move desk away from the heater, or perhaps to another office, and perhaps the member of staff could have a desk closer to the heater, in order to resolve this issue.

If the Secretariat is able to accommodate this advice, I would suggest that I review CH on a weekly basis, to ensure that she is coping with her adjusted work role and would keep you informed regarding her progress.

....

The substance of the Health Adviser's recommendations as to the modification of CH's duties appear to have been accepted and implemented (no doubt after further discussion with CH about detail), enabling Ms H's return to work as confirmed in the memo of 10<sup>th</sup> February 2010 which we will set out in the chronological sequence below.

48. On 18th January 2010 Miss C wrote to Ms. CH explaining that having now received full advice the Secretariat intended to proceed with KD's grievance using "Part 3,

Annex 3: Measures for Dealing with Harassment Cases", to be implemented at "Point 8, Formal Action". It will be noted that this was a change from the position set out in the 4th January letter (which had indicated that Annex 2 would be used).

49. The Health Adviser's report (above) was sent on 19th January 2010. On the same day MO, head of HR, sent a memo to DSG M-M noting that Annex 3 envisaged the use of the Equal Employment Opportunities Panel (EEO Panel) recommends the use of an external investigator in preference to the EEO Panel:

### **“1. The Equal Employment Opportunity (EEO) Panel**

There are no historical records in HR regarding the EEO Panel which will lend themselves to having a fair process. As such we have requested CPAD to have a look in the library records for any information relating to the EEO Panel. We are however concerned about the timing that this will take vis-à-vis timelines for handling grievances and the current sensitivities within CPAD on this matter. Additionally, this procedure has been superseded by customary practice as evidenced by Roli Degazon-Johnson Vs Ann Keeling 2007.

On this basis the use of the EEO Panel has effectively therefore not been practiced in a significantly long period in the Organisation. Whereas it is recognised and appreciated that the Secretariat ought to comply with its own policies and procedures, as embodied in the Handbook; it has proved difficult to replicate an EEO Panel without access to the following:

1. Documentation on the terms of reference and procedures for the EEO Panel.
2. Any procedures and modus operandi of past EEO Panels. In the absence of this, there's an eminent risk of the Secretariat being held to account by employees who may have been in the Organisation previously and may be privy to information which currently not readily available for such a decision.
3. Also, we are concerned that at least one of the parties who has brought a formal complaint appears to be aware of the process followed in the most recent harassment and grievance case and has requested an aspect of this in their correspondence.

In the interest of time, if Management could advice HR as to whether we go by the legal advice despite those concerns and if that be the case, if HR could be advised how the EEO Panel should be replicated and what the terms of reference would be.

Otherwise, HR strongly recommends that the practice that was applied in the Roli Degazon-Johnson Vs Ann Keeling 2007 case be adapted for this matter and given that there's a grievance and counter-grievance, HR recommends the usage of a single external investigator.

Given the breakdown of communication between the staff and Line Management, and the avid attempts to resolve the matter which have been unsuccessful, and have resulted in a frustration of both the staff and Line Management, (including a report by the Director for advice on what procedure to follow in lodging his grievance against one of these staff) HR recommends the use of an external investigator in this light in order that the sensitivities are taken into account. This too would lend credence to the application of the suggested route rather than replicate an EEO Panel. Submitted for your approval/advice please".

50. Ms. C wrote on 20th and then (substantively) on 26th January and Ms. (E)L also on 26th January updating the position. Ms. C's letter of 26th January stated:

"Dear C(H)

Further to my letter dated 20 January 2010, I am now writing to confirm that the points you raised in your letter dated 15 January 2010, have been considered.

When we met with you on 22 December 2009, regarding the grievance that KD had raised regarding your behaviour, we confirmed that we would be using the most expeditious process in the Sutherland Handbook, namely the Mechanism to Deal with Contract and Administrative Grievances, as has been custom and practice within the Secretariat for some time. In addition, there is no longer an EEO Panel set up to deal with grievance complaints. We were of the understanding that you accepted that we would use this Mechanism. This was confirmed in writing to you in my letter of 24 December 2009.

In your letter dated 4 January 2010, you advised us that you did not accept the use of the Mechanism to Deal with Contract and Administrative Grievances and we therefore undertook further guidance as to the best way forward, as confirmed in my letter of 12 January 2010. The letter also explained that this meant that the start of the investigation process would be delayed.

I understand that your line manager, ME, is on holiday and expected back on Monday 1 February 2010. As you are aware, your line manager would be the person to deal with your grievance. In view of this, we will contact you again next week when M returns to the office, in order to confirm a meeting date to discuss the next steps in the grievance process."

51. On 2nd February 2010 CH reported to Ms. B, Occupational Health Adviser, (as recorded in Ms. B's e-mail of 9th February 2010) that she was "coping well with the restricted hours" she was now working but that she had experienced an upsetting e-mail exchange with KD as a result of which she had felt unable to attend the following day. Ms B records that she advised CH that if she needed KD to carry out any work "she should do this via her line manager and she agreed to this".

52. On 3rd February 2010 ME wrote inviting Ms. Hume to a meeting (initially scheduled for 5th February) about her grievance against KD and his against her. It is not clear whether this meeting took place.
53. On 8th February 2010 CH met with Ms. (E)L and set out her understanding that KD had received a warning letter. This was contradicted in Ms. (E)L's reply dated 11th February:

"... I should highlight that the Disciplinary Rules and Procedures and the Grievance procedure are two separate processes.

Under the Sutherland Handbook Annex 1, Disciplinary Rules and Procedures, any member of staff who becomes aware of conduct subject to the disciplinary procedures, should report the same to their Director. Their Director "shall consult the Director Corporate Services or senior member of PSDD, who will advise and assist in any necessary investigation. The Director will subsequently meet with the individual to explain the allegation and give the individual the opportunity to respond."

Therefore, had you wanted to invoke the Disciplinary Rule and Procedures, you should have written to your Director, E del B, through your line manager, making it quite clear that this is what you were doing. However, in your written submission dated 17 December 2009 to CL, Director Finance & Administration, you refer to a formal grievance against KD: "Formal Complaint against KD for Harassment." It was on this basis that HR proceeded to address this as a grievance, as confirmed to you in my letter of 20 January 2010 and explained to you in our meeting of Monday 8 February 2010.

I would also want to clarify the point raised at our meeting of 8 February 2010, that KD did not receive a warning letter but was advised in a letter dated 26 January 2010, that you had lodged a grievance against him and that he would be advised of the next steps relating to this grievance."

54. Meanwhile on 10th February by a memo to the library team ME formalised the special arrangements which had been put in place for CH.

"Dear Library Team

In the context of the current work environment in the library, and based on advice, I'd like to inform you of the following:

- 1) CH's working hours, subject to clarity of advice discussed separately with herself, will be flexible and in the main have been put at 9.30 am to 2.30 pm daily. This is subject to review.
- 2) KD's work station will be temporarily moved to CPAD's Quadrant House location. I do not expect this arrangement to exceed 3 months.

3) For all management-related matters, K(D) will report directly to myself.

May I assure all of you that we are seized with finding a solution to this matter as soon as possible."

55. On 12th February 2010, Ms. (E)L wrote to inform CH that Ms. LA had been appointed to investigate her grievance and that a meeting was scheduled with her for Tuesday 16th February.
56. On 16th February CH met with Ms. B, the Occupational Health Adviser and told her that whilst CH was anxious about the process, Ms (C)H nonetheless hoped it would resolve the issues.
57. On 15th February following CH e-mailed Ms. (E)L as follows with regard to the proposed meeting with Ms. (L)A:

"E(L),

I cannot confirm that I will be attending this meeting until the following is clarified.

I note in your e-mail Friday 12th February that an investigator has been appointed in relation to my complaint against KD. Please be so kind as to confirm as soon as possible in writing that this investigation is constituted as per the provisions of paragraph 9, Annex 1, Part Three of the Sutherland Handbook. (Page 154).

I look forward to hearing from you."

Ms. (E)L responded as follows the same afternoon:

"Dear C(H)

Further to your email below, you are aware that the Secretariat is keen to resolve the pending grievance cases raised by both you and K(D). As you know, the Secretariat no longer has an EEO Panel to carry out grievance investigations and therefore, in its efforts to resolve these issues and ensure a neutral background to the investigations, the Secretariat has appointed Ms (L)A, an external consultant, to carry out the investigations. As discussed in our meeting of 8 February 2010, HR has made the necessary arrangements to bring in an external investigator and you will therefore be required to attend the meeting scheduled with Ms (L)A in QH Meeting Room 3 on Tuesday 16 February 2010, at 10.30am to enable us to progress this matter.

I am copying your line manager, Mr (M)E and your CSSA Representative, for information."

58. It appears that in the event Ms. (L)A met with KD on 16th February and separately with CH on 23rd and 25th February. According to Ms. B's note of a health review meeting on 24th February, CH was regarding the investigation as an "ordeal".

59. In the course of the meeting on 25th it appears that Ms. (L)A made an observation that she did not regard the “Sutherland Handbook (Yellow Book) as legally binding”.
60. On 26th February CH wrote to Ms. (M)O raising a further grievance. We set out her letter in full:

“Dear M,

**Annex 2 - Mechanism to Deal with Contract and Administrative Grievances - Contractual Grievance with the Commonwealth Secretariat**

At a meeting with Ms LA on the 23rd February 2010, she said she would make certain enquiries and then confirm to me whether the contents of the Sutherland Handbook are legally binding.

In a subsequent meeting with L(A) on the 25th February, 2010, L stated that “the Sutherland Handbook was not legally binding.” I asked her if she had sought legal advice for this answer and her reply was “no.”

Having looked at my contract of employment dated 8 November 2007

paragraph 3 states: “This contract incorporates the Commonwealth Secretariat Staff Regulations and Staff Rules as laid down and amended from time to time by member Governments and/or by the Commonwealth Secretariat”.

In addition, paragraph 6 states:

“Your attention is drawn specifically to the procedure for settling disputes that may arise in connection with your employment. Under the Commonwealth Secretariat Act 1966, the Secretariat has immunity from suit and legal process. However, the Staff Rules contain a procedure for the redress of any grievance. In addition, there exists an independent Arbitral Tribunal for settling disputes to which the Secretariat is a party, in a manner consonant with its status as an international organisation. Any staff member who feels aggrieved by reason of an alleged non-observance of the Secretariat of the terms of his/her contract of employment and remains dissatisfied after exhausting all available remedies under the grievance procedure, may refer his/her complaint to this Tribunal.”

Therefore, I maintain that the contents of the Sutherland Handbook are legally binding as they are fully incorporated into my contract of employment with the Commonwealth Secretariat. I also maintain that the staff rules and regulations have not been applied properly and/or at all in relation to my grievance against KD and his grievance against me. I say that the failure by the Commonwealth Secretariat to abide by the provisions of the Sutherland Handbook constitutes a fundamental breach of my contract of employment with the Secretariat.

Please be advised further that I was very shocked by LA's assertion that the provisions of the Sutherland Handbook are not legally binding. As a direct result of her statement, I have been forced to reconsider my position. Having done so, it is with regret that I must inform you that I am left with no other option but to withdraw from the investigation process at this time and with immediate effect. My reasons for this decision are as follows:

- i) The relevant provisions of the Sutherland Handbook and their implementation by the Commonwealth Secretariat are CRUCIAL to the issues that form the subject matter of this investigation, yet the investigator has no proper appreciation or understanding of the legal import of the provision of the Sutherland Handbook. This fact alone fatally flaws the investigation from the beginning.
- ii) Secondly, the same investigator is investigating my grievance against KD and his grievance against me. Even though there are two separate grievances where two very separate mechanisms SHOULD BE APPLIED, there will only be one investigation. I believe that I am extremely prejudiced by the failure of the Commonwealth Secretariat to instigate TWO SEPARATE investigations in this instance. Again, a single investigation will be carried out by someone who has a completely flawed appreciation and understanding of the legal import and application of the provisions of the Sutherland Handbook.
- iii) Finally, despite constant requests on my part, no confirmation has ever been provided to me by HRS that in relation to my grievance against KD, the investigation forms part of the formal process set out in Part 3, Annex 1 of the Sutherland Handbook. I stated in an e-mail to EL 15 February, that I would not attend the investigation unless this assertion was confirmed by HRS.

Please be advised therefore that this letter serves as a formal notification to you, as Head of HRS, of my contractual grievance with the Commonwealth Secretariat in relation to the matters set out above. Please find attached details of each individual breach of contract that has accrued since I lodged my formal grievance 17 December, 2009.

I request that the current investigation be stopped pending the outcome of this complaint relating to my contractual grievance. I also request that Annex 2 of Part Three of the Sutherland Handbook be applied properly in relation to my contractual grievance with the Commonwealth Secretariat, as per the provisions set out under the - "Mechanism to deal with Contract and Administrative Grievances."

61. On the same day (26th February) Dr P, the general practitioner, reassessed CH. She found that CH was helped by the shorter hours but was still finding it difficult to cope with the atmosphere at work. She stated that CH would like to go into work without being afraid. The doctor noted that the "depression part" of her problem had "subsided somewhat but that she was still extremely anxious" (Report of 23rd August 2010).

62. CH met Ms. B for a health review on 5th March 2010. It is apparent from Ms. B's note (11th March) that CH continued to have "issues" with KD. Ms. B had to remind CH that she was supposed to be carrying out operational tasks only, with no managerial tasks. However CH had explained how she felt responsible for the smooth running of the department. She said that she did not feel able to increase her hours further but Ms. B had said she would be able to do so once there was conclusion to her "issues".
63. On 10th March CH informed Ms. (E)L that she would be on holiday from 18th March to 14th April.
64. On 15th March she was invited by HR to meet the investigator on 18th March; but this was the first day of her holiday and she did not attend.
65. She duly returned to work on 15th April 2010. At a medical review with Ms. B she indicated that she felt able to return to working her contracted hours. She requested that she should have no contact with KD.
66. On 22nd April the HR department further invited CH to meet with the investigator. CH however, had apparently decided to withdraw from the process and did not attend.
67. On 30th April 2010 Ms (C)H met Ms. (P)C and Ms. (E)L together with CH's CSSA representatives. From later correspondence, it appears that she then confirmed her withdrawal from the investigation process.
68. The Respondent's account of that meeting was later set out in two paragraphs of a letter (the letter of 18<sup>th</sup> November to which we return below) as follows:

"At a meeting on 30 April 2010, whilst accompanied by your CSSA representative, despite the renewed invitations you re-stated that you were withdrawing from the grievance process that was being held for Keith against yourself on the grounds that you felt that the investigation had run beyond 20 days and it should be stopped. At the said meeting, your concern that your grievance should be dealt with under Annex 1 Disciplinary Rules and Procedures was discussed and you advised that your grievance, the title of which was 'Formal Complaint against KD for Harassment' was appropriately being dealt with under Annex 3: Mechanism for Dealing with Harassment Cases."

Pausing there, it may be that "appropriately" should read "inappropriately". The

letter continues:

You also indicated that you did not agree that this was the correct mechanism to use and therefore you had initiated a further grievance under Annex 2: Mechanism to deal with Contract and Administrative Grievances. You indicated that a mediator be appointed to assess the grounds for complaint and that you wanted the mediator to be someone with a legal background as you felt that this was crucial to the understanding of your case. HR advised you that (*sic*) in view of the fact that your initial grievance was on harassment and was being dealt with under the appropriate provision, which you were not willing to accept, the matter would be referred to the Legal and Constitutional Division for a review as it would not be appropriate to deal with another grievance premised on an apparent misinterpretation by yourself of the Handbook provisions relating to your grievance."

69. CH for her part later claimed that it was agreed to appoint a mediator at that meeting (see her later e-mail dated 21st September 2010).
70. On 4th May 2010 CH again met Ms. B for a medical review. By this time she was working normal hours again and was coping well. A similar conclusion was reached when she met with Ms. B again on 6th July and again on 20th July. The note relating to 26th July mentioned that Ms B had received e-mails from KD "which she finds is written in a harassing tone".
71. Following a further medical review with Dr. P she was signed off sick again on 29th July, initially for three weeks. In the end she was to remain off work until mid-September when she returned for a week but was then off sick again, as we record below. .
72. Before CH went off sick on 29th July there was an exchange of e-mails between CH and GG of Communications and Public Affairs Division. GG suggested a "sort it out" meeting between KD, CH and herself on the basis that it would be better to talk than write "tonnes of e-mails". GG was concerned that if allegations were made about KD's behaviour, he needed to be copied in so that he could explain himself. She was also concerned about the problems, or potential problems for the Department arising from the fact that CH and KD were not speaking. She commented that she shook her head in disbelief "at this sad state of affairs".

73. It appears that CH was unhappy about GG's involving herself at all, in circumstances where a formal grievance was in place. She thought it wrong that KD was copied in on e-mails relating to his conduct.
74. On 23rd August 2010, during CH's further absence Dr P reported, setting out set medical history and recommending "sensible and sensitive managerial options", but without being prescriptive as to what they should be.
75. On CH's planned return in mid-September, Ms. B re-iterated that CH should again be free of managerial responsibility and that she should avoid KD.
76. The return to work in September did not go smoothly as the following e-mail exchange reveals:

**Mr del B to CH: 21st September**

"I understand from H you have returned to the office, and are working part time.

I must admit I am puzzled you haven't come to see me to explain how you will resume your functions at ComSec.

We shall discuss this next week when I return from New York.

E".

**CH to Mr del B: 23rd September**

"E(delB),

How can I come and see you when you are in New York?

I find this email upsetting. I have been dealing with the Occupational Health Advisor and M(E), it is their responsibility and HR to inform you. I have been off sick for seven weeks - genuinely really sick! I cannot remember the last time you wanted to talk to me, and I cannot read your mind. If you do want to talk, perhaps you would have the courtesy to ask for a meeting.

C(H)"

**Mr del B to CH: 23rd September**

"C(H)

I am leaving for New York today. I was in my office Monday and Tuesday, and normal procedure at ComSec is for the staff member to call on the director to explain his or her situation so that proper steps can be taken to ensure the smooth operation of the unit.

E(delB)"

**CH to Mr del B: 27th September**

"E(delB),

I have looked in the Sutherland Handbook and the Sick and Absence Procedures and cannot find the "normal procedure at Com Sec is for the staff member to call on the director to explain ...". Please quote where this procedure can be found so that all in the library including both H and T can benefit.

After speaking to both HR and Manoah if you need any further clarification please do not hesitate to ask.

C(H)"

**Mr del B to CH: 27th September**

"C(H)

It is simply common sense and common courtesy to keep your director informed about your presence at the office and how your health is affecting your presence on the job.

E(delB").

77. Meanwhile on 21st September, CH enquired what had happened about the appointment of a mediator.
78. On 23rd September she became distressed and went home, visiting the GP.
79. She came back the following day (see Ms. B's records) and enquired of Ms. N about contract renewal.
80. She was away again until late October.
81. On 24 October 2010 she had a return to work meeting. We set out Ms. B's record of that meeting (from her e-mail to Ms. N dated 8th November 2010):

"Thank you for asking me to attend the return to work meeting between C(H) and her Director E del B on 21.10.10, together with you, EO and C(H)'s staff representative. Although this was a return to work meeting, and not an Occupational Health review, as I had an input in the meeting, I feel it would be helpful if I contact you with this report.

As you are aware, C(H) became very distressed at the meeting, and needed to take a break in the proceedings; I went out to talk to C(H), and she later felt able to resume the meeting.

**It was my perception that C(H) had said in the meeting that she found E(delB)'s behaviour was bullying and his manner interrogatory and I noted this in my first draft of this report which I sent to C(H). However, C(H) has requested that I now note that she was referring to E(delB)'s previous behaviour, not his behaviour in the meeting.**

**It was my opinion that E(del)'s manner had not been bullying or interrogatory on this occasion but that he had merely been trying to ascertain C(H)'s fitness for work and any adjustments to her role which she felt would be helpful. C(H) agreed.**

I believe that we agreed that C(H) would continue to have no managerial duties for KD, neither would she have to be responsible for the library rota, as this had caused her distress when she felt that KD had not performed his required duties. CH stated that she enjoyed her job in the library and it was agreed that CH duties would be purely operational for the present time.

I believe that C(H) has been advised by her GP that she is fit for work, albeit in a part-time role at present. She has worked for 4 hours for 4 days per week since her return to work on 20.09.10. I suggested that as she would be working on operational tasks only that she might feel able to increase her hours to 6 hrs per day for 4 days per week, Monday, Tuesday, Thursday and Friday from 25.10.10., and CH agreed that she would try this. If she then feels able, I suggested that I would then contact CH on 08.11.10, and if she felt able, she could then resume her normal working hours from 08.11.10.

I also suggested that it might be helpful to promote a better working relationship in future with her line-manager and her director that CH also had weekly meetings with E(delB) and/or M(E) and HR to monitor her progress in her role, and I believe that it was agreed that this would be commenced. However, it is still my opinion that CH's issues surrounding the grievance issues MUST be addressed and resolved at the earliest opportunity, in order to improve her working relationships with KD and her managers.

As noted above, I will contact Catherine on 08.11.10, for review and CH has requested that the content of this report be shared with her line managers.

CH has seen and agreed the content of this report."

[Emphasis added]

82. A further health review meeting with Ms. B on 8th November is recorded as follows:

"I have spoken to C(H) today for review.

She told me that although she has coped with her current hours of 6hrs per day for 4 days per week, she is feeling very tired and does not currently

feel able to increase them further to resume her normal working hours. C(H) told me that she is still feeling stressed regarding the lack of a resolution to her work related issues regarding the various grievance issues and does not feel that she will be able to resume her normal working hours until these are addressed and resolved.

C(H) told me that she has notified her managers that KD is not carrying out his task of dealing with the journals and that these are now backing up and she is finding this stressful. I advised her that as we had agreed at our last meeting of 21.10.10, that she should have only operational duties, and no managerial duties for KD, that she should not concern herself with this issue, but refer it back to her line-manager to deal with. She was also concerned that other employees wishing to access these journals would be inconvenienced by the fact that they were not on the shelves and I advised her to refer these people to her line-manager if she felt unable to address it with them. C(H) agreed to do this.

As I stated in my report from the meeting on 21.10.10., it is my opinion that the issues surrounding the grievance issues should be addressed at the earliest opportunity, in order to improve C(H)'s working relationships with her managers and KD. As C(H) has told me today that she does not foresee that she will be able to return to her normal working hours until these issues are resolved, I can only advise that she remains fit to continue working 6hrs per day for 4 days per week, and that the actual hours should be arranged with her managers.

If you would like me to review C(H) again or offer further Occupational Health support I am more than happy to do this, but will await further instruction from you before doing this.

C(H) has seen and agreed the content of this mail. ...”

83. On 18th November Ms. (E)L wrote as follows:

“Dear C(H)

Further to our meetings on your grievance in which we discussed your concerns as detailed in your respective correspondence of 26 February 2010 and 27 April 2010, I wish to confirm in writing the advice provided to you regarding your concerns, now that you have recently returned from your sick leave.

You had raised, among other issues, a query regarding the contractual status of the Sutherland Handbook. As earlier advised, your contract of employment is subject to, and must be read with the Staff Regulations and Staff Rules as contained in the Sutherland Handbook. The effect of this is that the Staff Regulations and Staff Rules are binding on you. I must point out here that Part One of the Sutherland Handbook which provides guidance to Human Resources Management Policies and Procedures in the Secretariat and is consistent with the Rules and Regulations in Parts Two and Three, does not form part of your contract with the Secretariat.

With regard to your grievance which you lodged against KD, I must state that procedures for dealing with grievances in the Secretariat are laid down in Annex 2 and Annex 3 of the Sutherland Handbook while procedures and acts or omissions subject to disciplinary action are found in Annex 1 Part 3 of the Sutherland Handbook Disciplinary Rules and Procedures. As advised earlier the appropriate mechanism to be used in dealing with your grievance therefore is not a disciplinary procedure can only be invoked after allegations are dealt with and proven through a grievance procedure which must be completed before invoking the disciplinary processes.

Furthermore, the invoking of disciplinary action while a grievance procedure is in process would be prejudicial and wrong. Therefore, the Secretariat is not in a position to institute disciplinary proceedings in this matter unless and until the grievance procedure, currently in place, establishes grounds for such a disciplinary action. Thus, an investigation into your complaint would still be required in order to ascertain the validity of your allegations.

As explained to you at the time of engaging the investigator, since your grievance against KD and his grievance against you were so intertwined it would have been extremely difficult to implement two separate investigations as they would have been speaking to the same witnesses about the same issues. The appointment of one investigator was only sanctioned after discussion, consultation and your acceptance of this arrangement. To date, the investigation process that HR instituted to resolve your formal complaint has not been concluded as you removed yourself from the process after attending two meetings with the investigator. However, your expressed perceptions relating to the investigator were unfounded as she confirmed to you that parts of the Sutherland Handbook are contractually binding as explained above.

In view of the foregoing, HR renewed their invitation in writing for you to meet with the investigator on 15 March 2010, 22 April 2010 and 28 April 2010 respectively, in order to progress and conclude investigations which are necessary for your grievance to be conclusively dealt with. Unfortunately you declined the invitations.

At a meeting on 30 April 2010, whilst accompanied by your CSSA representative, despite the renewed invitations you re-stated that you were withdrawing from the grievance process that was being held for Keith against yourself on the grounds that you felt that the investigation had run beyond 20 days and it should be stopped. At the said meeting, your concern that your grievance should be dealt with under Annex 1 Disciplinary Rules and Procedures was discussed and you advised that your grievance, the title of which was "Formal Complaint against KD for Harassment" was appropriately being dealt with under Annex 3: Mechanism for Dealing with Harassment Cases.

You also indicated that you did not agree that this was the correct mechanism to use and therefore you had initiated a further grievance under Annex 2: Mechanism to deal with Contract and Administrative Grievances. You indicated that a mediator be appointed to assess the grounds for complaint and that you wanted the mediator to be someone with a legal background as you felt that this was crucial to the understanding of your case. HR advised you that the in view of the fact that your initial grievance

was on harassment and was being dealt with under the appropriate provision, which you were not willing to accept, the matter would be referred to the Legal and Constitutional Division for a review as it would not be appropriate to deal with another grievance promised on an apparent misinterpretation by yourself of the Handbook provisions relating to your grievance.

After the meeting, your occupational health situation and sickness absence which commenced on 29 July 2010 had to be taken into account in progressing this matter. However, following your resumption of work on a more regular basis and he back to office meeting on 21 October 2010, and mindful of the Secretariat's duty of care responsibility, as well as the occupational health report indicative of improvement in your health. HRS is now ready to continue with the process of investigating your grievance.

In view of the organisation's commitment to ensure a speedy resolution of the matter, it is now necessary to urgently progress and conclude the investigation. Considering that the issue that you raised concerning the investigator's interpretation of the Handbook has been clarified and conscious of the fact that as a result of the two meetings that you had with the investigator, you decided to withdraw from the process, the Secretariat is prepared to engage a different investigator as requested by yourself who will investigate your grievance under Annex 3: Mechanism for Dealing with Harassment Cases.

In the above context and in order to urgently progress and conclude your grievance, please see the attached details of Ms JB from Bowden2, who has been appointed to investigate your grievance against K(D). I will contact you early next week to confirm her availability but we are tentatively looking at a meeting with her on 1st or 2nd December 2010, in order to continue with the investigation process."

84. On 25th and 26th Ms. (E)L e-mailed CH seeking to set up a meeting with the new investigator, Ms. B.
85. There was no response. Instead, CH resigned by letter in the following terms:

"Dear Secretary General,

It is with great sadness that I write to inform you of my resignation from the post of Manager and Head of Library and Archives at the Commonwealth Secretariat with immediate effect. I was thrilled to get the job in the Library and archive, and it gave me great enjoyment to use my skills and experience to transform the library operations, and assist people, such as yourself with their information needs.

I have cleared my desk and followed all the exit procedures. All keys I have used I have put in the desks or filing cabinets. I also enclose my cut up corporate credit card. I have 4 and 1/2 days holiday owing and my lump sum. If you could arrange for HR to inform me of the outstanding financial details and pay what is owing to me into my designated account I would be most grateful.

As you may be aware, my health and personal wellbeing have been put under considerable strain during the past 18 months due to the untenable situation that has developed between myself and a co-worker in my section and the senior management of CPAD. Unfortunately, matters have been further exacerbated by the continued failure of senior management in CPAD and the Human Resources Section to deal with the issues properly or at all. Indeed, to compound problems, the Director of CPAD employed bullying tactics against me on more than one occasion.

Please be advised further that during this protracted and sorry dispute, procedures set out in the Sutherland Handbook were not adhered to, clarity of process was absent, direct requests were ignored, timescales and deadlines were blatantly disregarded, delays were inordinate and strict confidentialities were breached. As a result, I believe that all of the foregoing instances of apathy and lack of engagement on the part of HRS and management within Com Sec constitute fundamental breaches of my contract of employment with this organisation. The impact of the breaches effectively creates an impossible working environment. Accordingly I maintain that I have been constructively dismissed."

86. On 2nd December the Secretary-General wrote to CH on a "without prejudice" basis to invite her to reconsider her resignation but she did not. Instead she filed her application to the Tribunal.
87. The application complained of constructive dismissal and breach of contract ,contending that the Respondent had misapplied Procedures and failed to deal properly with her grievance and had thereby failed to heed medical advice. Subsidiary allegations were made in relation to bullying and non-renewal of contract.
88. The Respondent's Answer was filed on 18th April, CH's Reply on 8th June 2011 and the Respondent's Rejoinder on 22nd August 2011.

### **THE KEY ISSUES**

89. Before considering in turn our conclusions on the claims for breach of contract and constructive dismissal, we will address the key issues, which we have identified as follows
  - (i) Was the Respondent obliged to adopt the disciplinary procedure in dealing with the complaint against KD?

- (ii) Was the Respondent entitled to use the Annex 3 procedure for that complaint (the Applicant's first grievance)?
  - (iii) Was the Respondent justified in its procedural approach to CH's additional grievance of 26th February
    - (a) in not progressing a separate grievance process in response to that grievance
    - (b) in appointing an investigator rather than a mediator?
  - (iv) Was the Respondent guilty of delay amounting to a breach of contract in dealing with the grievance?
  - (v) Was the Respondent in breach of its health and safety obligations to the Applicant?
  - (vi) Was the Respondent guilty of bullying the Claimant?
  - (vii) Was the Respondent guilty of breach of contract by failing to notify the Claimant as to whether her contract would be renewed?
90. We should add that, without developing the point in detail, the Respondent did not accept that internal remedies had been exhausted by the Applicant. Since the complaint is essentially about those very internal remedies and in view of the conclusions we have reached, we have not thought it helpful or necessary to address this issue separately.
91. In the light of our resolution of the issues we have identified, we will finally set out our conclusions on
  - (a) breach of contract
  - (b) constructive dismissaland the consequential issues, so far as they arise of

(c) rescission

(d) damages

(e) costs.

(i) Was the Respondent obliged to adopt the disciplinary procedure in dealing with the complaint against KD?

92. No.

93. The Applicant regarded KD's conduct as insubordinate and distressing. She thought it justified disciplinary action. Her complaint should, she argues, have been pursued under the disciplinary procedure (Annex1), not under any form of the grievance procedure (Annexes 2 and 3).

94. To this argument, there are answers of both form and substance.

95. As a matter of form

(i) her complaint was headed "grievance"

(ii) it was not addressed or delivered to her Director, Mr del B, as would have been appropriate if it had been intended to invoke the disciplinary procedure (see paragraph 20 above)

96. Her complaint does, however, make clear her view that KD's conduct merited disciplinary action under the disciplinary procedures.

97. We therefore attach greater significance to the point of substance which is as follows. The Respondent was faced with a (prior) grievance from KD about CH's management of him. The issues in KD's grievance would inevitably be intertwined with the issue in CH's complaint. It would be highly problematic to have separate inquiries (potentially reaching inconsistent conclusions) about the two. It made sense therefore to proceed in the first instance by way of a combined inquiry into KD's grievance and CH's counter-complaint. The conclusion of that enquiry might or might not then entail disciplinary action against KD.

98. We recognise of course that it is possible for grievances to be launched against managers by way of “pre-emptive strike” in order to fend off disciplinary action. We do not suggest that it would be appropriate in every case to defer consideration of a disciplinary issue simply because a grievance has been raised against the manager concerned.
99. In this case, however, there was clearly a history of difficulties between KD and CH. They were of a kind which senior management had initially (we think wisely) set to out to resolve informally with “tea and cakes”. It could not be said that KD’s grievance was an obvious device to forestall disciplinary action or that the matters of which he was accused were so serious as to require immediate implementation of disciplinary processes.
100. In short, we conclude that the Respondent acted within the management discretion it enjoys in running the organisation and consistently with the requirements of the relevant procedures in processing the complaint against KD as a grievance in the first instance. Whether disciplinary action would then have been appropriate would depend on the outcome of that grievance.
- (ii) Was the Respondent entitled to apply the Annex 3 procedure for the Applicant's first complaint ?
101. Yes.
102. The Respondent changed its view about whether Annex 2 or Annex 3 should be used. Ultimately it decided that Annex 3 was the more appropriate. On balance we think that its final view was justifiable and indeed correct.
103. Annex 2 applies where there is an “administrative or contract related problem”. This is not apt to describe the Claimant’s complaint. Although a problem with a subordinate may sometimes be described as “administrative” (or even “contract-related”) this will normally only be the case when it involves a question of whether the complainant’s boss, or the organisation generally, has “administered” the problem incorrectly. The fact that a junior colleague is troublesome is not, in itself, an “administrative” complaint.

104. Annex 3 applies to "harassment cases". Whilst "harassment" is not a perfect description of the kind of difficulties CH was experiencing, it better captures the essence of her complaint than the language of Annex 2. Paragraph 5 of Annex 3 elucidates the sort of steps which the complainant should take in such cases; those steps closely mirror the steps which CH in fact took.
105. Stepping back from the language of the Annexes, moreover, we think that there must be implied into the contract of employment some flexibility as to which procedure is implemented in what circumstances. The purpose of the procedures is, after all, to resolve problems and not to create them. Grievance procedures, in particular, are intended to facilitate resolution of difficulties in the workplace and, in the absence of compelling language to the contrary, management must enjoy a measure of discretion as to which best meets the circumstances.
106. In the present case, the Respondent was amply justified in deciding that Annex 3 should be applied.
- (iii) Was the Respondent justified in its procedural approach to CH's grievance of 16th February?
107. Yes.
- (a) Lack of a separate investigation into the 26<sup>th</sup> February grievance.
108. On 26th February 2010 the Applicant launched a fresh grievance and sought to invoke Annex 2. It will be recalled that the three elements of dissatisfaction were
- (1) the investigator's failure to appreciate the contractual, legally binding status of the discipline and grievance procedures;
- (2) that the same investigator was investigating her grievance against KD and his grievance against her, whereas, she said, the grievances should be separated;
- (3) the Respondent had not confirmed that the investigation regarding KD was part of the disciplinary procedure.
109. It is convenient for us to comment briefly on the substance of these points before we deal with the procedure adopted.

110. As to (1) the Applicant was correct in her contention that the procedures were legally binding, in the sense that they formed part of the contract incorporated by the Staff Rules and Regulations. Having made her position (in this respect a correct one) entirely plain, however, we do not see why it was necessary to launch a separate grievance on the issue before the investigation was concluded.
111. As to (2) this was a decision which the Respondent had taken into in the interests of resolving the issue in an orderly fashion. We have already expressed the conclusion that it was justified in doing so.
112. As to (3) the Respondent did ultimately make it clear that it was dealing with the matter by way of a single “grievance and counter grievance” inquiry in the first instance. We have already concluded that it was justified in doing so.
113. Was the Respondent nonetheless obliged, as a matter of procedure to start a separate grievance investigation in relation to the matters raised? CH was plainly correct in saying that if there was to be a separate grievance, it should proceed under Annex 2 as an “administrative” grievance.
114. We conclude that the Respondent was not obliged to conduct a separate grievance investigation about the matters in the letter dated 26th February 2010, at least before the conclusion of the current investigation.
115. First, to have had a second “satellite” grievance investigation about the first investigation whilst the first investigation was continuing would have been unwieldy and would produce a host of undesirable complications.
116. Secondly, the matters which were the subject of the new complaint could all be addressed, if they remained relevant, at the end of the current investigation.
117. Thirdly, the Respondent having taken legal advice about the appropriateness of combining the grievance and counter-grievance investigations and the use of Annex 3, it was not realistic to suppose that these decisions might be unwound by a fresh investigator.

118. We consider that it is implicit in the contract and a principle of good administration in the international civil service that grievance procedures will be interpreted and operated flexibly to meet the needs of the case. Putting it the other way round, we consider that the Respondent was not bound to allow, during the currency of grievance investigations, a separate "satellite" investigation into whether their existing investigations were proceeding appropriately. To hold otherwise would do violence to the whole purpose of grievance procedure, which is to allow for the sensible and orderly resolution of disputes, not to require their proliferation at every turn.
119. We conclude that the Respondent proceeded appropriately in declining to hold an investigation into whether its existing grievance and investigation was proceeding appropriately.

(b) Appointment of investigator, not mediator

120. In November 2010 the Respondent announced the appointment of a new investigator. The Applicant had declined to participate in the investigations of the first investigator and had criticised her stance on the contractual status of procedures. It was a reasonable, proper and conciliatory step to appoint a fresh investigator.
121. The Applicant appears to have taken the view that the new appointee should have been a mediator, nor an investigator. Since the Respondent was proceeding under Annex 3, rather than Annex 2, the Applicant had no right under the procedures to have a mediator appointed. (See paragraphs 21 and 22 above)
122. It appears, however, that she believed that she had secured an agreement at a meeting on 30<sup>th</sup> April that the new appointee would be a mediator, rather than an investigator: her e-mail of 21st September 2010 (her Annex V refers). The Respondent's letter dated 18th November 2010 (her Annex VI) appears to accept that the Applicant asked for a mediator. The Respondent disputes having agreed to this course. The letter states that HR had told her that

"in view of the fact that your initial grievance was on harassment and was being dealt with under the appropriate provision, which you were not willing to accept, the matter would be referred to the Legal and Constitutional Division for a review as it would not be appropriate to deal with another

grievance premised on an apparent misinterpretation by yourself of the Handbook provisions relating to the grievance”.

123. On the material presented, we do not accept that any commitment was given that the new appointee would mediate, rather than investigate. To have appointed someone other than an investigator would have been inconsistent with the whole position adopted by the Respondent, which was that investigation was necessary in order to decide whether there was a legitimate complaint against CH or a case for disciplinary action against KD. We also note that the Claimant’s stress in Autumn 2010 does appear to have affected her perceptions. When she returned to work she made allegations about the back-to-work interview which, as Mrs B’s account records, she had to retract.
124. We are not satisfied that the Respondent gave a commitment to mediate at the meeting on 30th April or at all.
  - (iv) Was the Respondent guilty of delay amounting to a breach of contract in dealing with grievances
125. No.
126. We have however, found this the most difficult part of the case.
127. The Grievance Procedure does not specify precise timescales for its overall completion. We accept however, that it is a general principle that the outcome of grievance procedure should not be inordinately delayed. The fact that the procedures envisage a 20 day period for the completion of interviews (Annex 3 para. 13, Annex 2 para. 10) does not imply any precise date for the completion of the investigation; but does give a broad indication of that it is not expected to take many months.
128. In the present case there were readily understandable delays
  - (i) over the Christmas/NewYear period 2009/2010 when individuals were away;
  - (ii) in January February and early March 2010 whilst the Applicant was raising challenges to procedures and advice was being taken

- (iii) to the extent that the Applicant's involvement was required but was not possible due to her being on holiday from mid-March to mid April 2010
- (iv) from her return in April 2010 until the Applicant 's final confirmation at the end of that month that she was not going to participate in the investigation conducted by Ms Alexander
- (v) from the end of July 2010 until late October 2010 when she was (with the exception of a few days in September) off sick.
129. Looking over the whole history, the process undoubtedly became unsatisfactorily protracted. In large part this was due to the procedural stance adopted by the Applicant, her procedural challenges, the need to take advice on these and her unwillingness to meet with the investigator. It was also affected, as we have indicated above, in March and April 2010 by her holiday absence and between late July and late October by the Claimant's absence due to illness. It would have been unreasonable of the Respondent to deal with the grievance while the Applicant was absent sick or on holiday.
130. The members of the Tribunal were all troubled by the lack of correspondence from the Respondent in the months of May, June and July 2010 either to progress the matter or explain why it could not be satisfactorily progressed following the meeting with the Applicant on 30th April. However, the delay has to be seen against the background of the Applicant's refusal to meet with the first investigator, the ultimate replacement of that investigator, the challenges brought to the procedure used and the need to take legal advice. Set in that context, none of the tribunal members considers that there was inordinate delay amounting to a breach of contract although it is fair to record, that the case was close to the borderline on this one point.

(v) Health and Safety

131. There was no breach of the Respondent's duties in relation to health and safety.
132. The Claimant had medical support in the form of regular meetings with Ms. B. The Respondent took the recommended steps in separating her from KD (despite the inconvenience of doing so) and relieving her of managerial responsibilities where the medical evidence recommended it.

(vi) Bullying

133. We reject the allegation of bullying by management.
134. The Claimant withdrew the suggestion she had been bullied at the back to work meeting in October 2010.
135. As regards her exchanges with Mr Del B in December 2009 we do not consider that Mr del B's e-mails can fairly be characterised as bullying. Mr Del B and ME were clearly concerned at CH's suggestion that management was "complicit" in bullying by KD. Whilst the tone of Mr Del B's e-mails betrayed a degree of annoyance, he was entitled after having taken sensitive measures to resolve the difficulties between the Applicant and KD over the summer of 2009, to be told why management, including presumably himself and ME, were said to be "complicit" in bullying.

(vii) Informing the Applicant of non-renewal of contract

136. It was not a breach of Staff Rule 16 (or policy guidance) not to have informed the Applicant (by July 2010, six months before the expiry of her contract) about whether her contract would be renewed. Staff Rule 16 requires this information to be given "so far as practicable". Given the Applicant's uncertain health, and with grievance proceedings and the possibility of disciplinary action pending (if KD's grievance were upheld) we do not consider that the Respondent was required to announce a decision about non-renewal by the time of CH's resignation. It would not have been practicable to do so.

**Breach of contract**

137. It follows from our conclusions above that there was no breach of contract.

**Constructive dismissal**

138. It is a recognised principle of the law of the international civil service that if the employer is guilty of conduct indicating that it no longer considers itself bound by (or will not observe) fundamental terms of that contract the employee may resign and treat himself or herself as "constructively dismissed" : see Keeling v Commonwealth Secretariat and ILOAT Judgment 2967, ILO 110<sup>th</sup> Session

139. It follows from our findings and conclusions set out above there was no constructive dismissal. There was no breach by the Respondent of the terms of the contract, fundamental or otherwise.

**Consequential**

140. There is no decision requiring rescission.

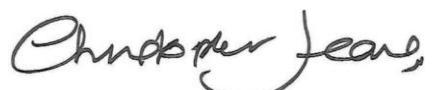
141. No damages fall to be awarded.

142. Accordingly, we dismiss all of the Applicant's claims.

143. We conclude that in all the circumstances no costs should be awarded to either party.

Given on this 10<sup>th</sup> day of January 2012

Signed



Christopher Jeans QC, President



Mr D K Dabee SC, Member



Justice Seymour Panton OJ, CD, Member