

CSAT APL/19

THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL IN THE MATTER OF:

H K

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal constituted by

Mr Christopher Jeans QC, President; Justice R N Ukeje, OFR, member and Mr Chelva R Rajah SC, member

JUDGMENT

Introduction

1. When he retired in December 2008, H K had served the Commonwealth Secretariat for 33 years. His service has been described as “highly valued” and “totally devoted”.
2. During the last 80 months of his employment he discharged not only the duties of his own post but also a substantial portion of the duties of a second post. It was recognised by all concerned that he should be paid for the extra work. However, no sum was offered to him for the extra work until well after his retirement. When an offer was eventually made he considered it seriously inadequate. He rejected the offer.
3. His claim is essentially to be compensated at an appropriate level for the extra work he did.
4. The Commonwealth Secretariat resists his claim on jurisdictional and procedural grounds. It also contends that the offer he rejected was a reasonable one.
5. We will first set out the facts in more detail. We will then address the issues as we see them.
6. It will be apparent that in making our findings of fact we have had to do our best with a limited narrative account from each side and with documentation which does not always “speak for itself”. We have drawn inferences where it has appeared to us fair to do so. We have declined to make findings in areas where we could only speculate.

The facts

7. The Applicant H K was employed by the Respondent from 15th September 1975 as Executive Secretary to the Regional Director of the Commonwealth Youth Program Asian Centre (“the Centre”). The Centre is in Chandigarh, India. This is where Mr KrishanK worked. There are other Youth Program Centres in other parts of the Commonwealth.
8. We do not have the documents relating to Mr K’s appointment. We infer, however, that at relevant times his terms of appointment incorporated the relevant Staff Rules and Regulations. The parties have proceeded on this footing.
9. Those employed at the Centre were paid in Indian Rupees.
10. Mr M P B was employed at the Centre, as Administrative Officer. (He is occasionally referred to in the correspondence as “EO” - Establishment Officer” - but we will identify his post as “Administrative Officer” as this is the principal term used).
11. Precisely how Mr B’s post inter-related with Mr K’s, and whether one was senior to the other, we have been unable to determine. As appears from the correspondence set out below, Mr K was (at least latterly) being paid a higher monthly salary than Mr B but we do not know whether there were special factors affecting the precise salary level of each (e.g. length of service) which could have affected their relative incomes, especially as reference is made at times in the correspondence to local conditions and Punjabi regulations as historic influences or reference points in the fixing of pay conditions.
12. In April 2002 Mr B left the Respondent’s service.
13. Mr Bhuktia’s salary on termination was 35,022 Rupees per month. Mr K’s was at that time in excess of 41,000 Rupees per month.
14. Instead of appointing a replacement Administrative Officer, the Respondent assigned the duties of the post to other employees.
15. Under these arrangements Mr K took on a substantial part of the duties previously discharged by Mr B.

16. Determining the precise percentage of the Administrative Officer duties assigned to him is obviously a difficult assessment, the more so for the Tribunal because the information we have is very limited, and we have no way of assessing the relative importance of the duties which he took over and those he did not.

17. Mr K considered that he performed around 50% of the Administrative Officer's former duties. The Respondent has suggested that the figure was around 40%.

18. The Respondent's assessment appears to have been based on a survey of comments from staff which may not have included Mr K.

19. We note that one of Mr K's Regional Directors was to describe him as having become the Administrative Officer (which would suggest that he had taken over the substance of Mr B's job). We note that another Regional Director described him as having "doubled up" jobs and later, as having taken over "the major chunk" of the Administrative Officer's duties. We "flag" these points in the correspondence we set out below.

20. Recognising as we do that the assessment is necessarily impressionistic we conclude on balance (having regard to the paragraphs above) that the percentage of the duties of Administrative Officer taken over by Mr K was of the order of 50%.

21. No additional payment was made for this extra work but it is plain from the subsequent correspondence from successive Regional Directors that it was never in dispute that he should be paid additionally. The only question, so far as successive Regional Directors were concerned, was the means through which this should be achieved. Should it be done by re-grading, or by an allowance, or in some other way?

22. From around 2005 a re-grading exercise took place. Mr K's job as Executive Secretary was one of a number of jobs downgraded. The Regional Director, RR, was disturbed by this and wrote to Mr L, Head of Finance, Corporate Services Division. After noting that most of the staff members appeared to be taking a salary cut, she made the following specific observations in relation to Mr K.

"I write to request that you consider the following:

1. Please review the grade assigned to the executive secretary who is not only, assistant to the RD but also the admin officer. Given the nature of both jobs, these require a significant level of networking diplomacy, tact and discretion. As admin officer he is often called upon to maintain organizational discipline decorum and serve as mediator where necessary. I recommend that this post be graded at G9 as at the Africa Centre.

2. I have done some calculations with Anil, and our budget will support the following:

The grades for all (with the exception of (1) above), to remain as per the revised classification so that some will gain under the new TACOS [Terms and Conditions of Service]; and

For those who are losing, I request that their salaries be protected i.e., remain at the existing level with no increases.

3. At the end of the day, we are talking of productivity, teamwork and individuals who are proud of working for the Commonwealth Secretariat.

4. Submitted for favorable consideration."

23. We note that Ms R was highlighting the features

(a) that Mr K was doing "two jobs"

(b) that both jobs done by Mr K entailed significant demands which were important to the running of the Centre

(c) that a post at the Africa Centre which Ms R was comparing to Mr K's was on a higher grade (though we have insufficient information to determine what similarities or differences in duties, overall demands or market pressures there may have been as between these posts).

24. In May 2006 Mr R M became Regional Director in place of Raka Rashid.

25. It appears from a later e-mail (sent by Mr M to Human Resources and senior management on 27 May 2008) that the new terms and conditions came into effect on 1st January 2007 but that decision was then taken later that year to restore to the previous levels the pay of those downgraded.

26. However the issue of recompensing Mr K for the additional work he had taken over from Mr B remained unresolved.

27. On 20th July 2007 Mr M wrote to the Head of Finance Corporate Services Division Mr L (copy to Dr F S, Director Youth Affairs Division) by e-mail on various matters. He raised the question of Mr K's "doubling up" jobs and whether the jobs of Mr K and another employee, the Admin. Assistant, should be re-assessed. Notably Mr K is referred to as the "AO" doubling up as Executive Secretary (whereas Executive Secretary was of course his original job). The material passage is as follows:

"i) Administrative Staff

I have a feeling that there has been a certain lack of appreciation of the role and responsibilities of the A.O. and the Admin. Assistant. You would agree that Administration and Finance constitute two major pillars of any organization. It is not fair to downgrade the role of Administration vis-à-vis Finance. Unfortunately, this seems to have happened in the case of the Centre. Apart from the administrative responsibilities relating to personnel, estate, transport, security and library, the A.O. also doubles up as Executive Secretary to the Regional Director. In the latter role A.O. has to liaise with all external agencies on behalf of the RD, take down minutes [sic. of] internal meetings and do follow up on the decisions taken. All this amounts to quite a handful. In the event of the abolition of the post of Facility Officer, whatever job he was doing will have to be shared by the A.O. and the Admin. Assistant. Moreover, as and when the Centre functions as one of excellence in the area of local self-governance, the responsibilities of these two staff will increase considerably, since the hostels will be used for accommodating the participants in various programmes. In view of the above, I would like to request you and HR to please have a relook and reassessment of the job responsibilities of these two staff. ..."

[Bold type is in the original, the underlining is ours].

28. On 10th September 2007 Mr M followed up his previous e-mail, "in the hope you would be able to attend to this long pending issue".

29. Mr L replied that to the effect "we are following up as a matter of priority".

30. We infer the "issue" which Mr L was to follow up would have included that relating to Mr K.

31. On 27th May 2008 Mr M wrote to M O (Head of Human Resources Section), Dr S and Mr L, referring to previous e-mails and conversations in person with management and human resources personnel regarding the general issue of revised job descriptions:

"Dear M, F and C.

This is a long-standing but unresolved issue which was taken up with Fatihaf and MarilynM when they were in Chandigarh last. Subsequently, I had taken it up with Chris through email, and briefly during his last visit to Chandigarh.

In a nutshell, the case relates to those staff of the Centre who had suffered salary cuts when the new TACOS came into being w.e.f. 01.01.2007. Later, in Sep-Oct 2007, a decision was taken, and rightly so, to restore to them the total salary being received by them prior to the TACOS. Since then, they have been receiving a consolidated amount without the benefit of DA or annual increment unlike those staff who had opted for the new TACOS and are now getting the benefit of annual increment and market rate adjustment. I feel, this is unjust. The plea that a final decision would be taken in their case after a review of their job descriptions is also not tenable. Nearly a year and a half has elapsed since E had collected the revised job description sheets from the staff of this Centre but we are no where nearer to the solution. ..."

32. On 31st December 2008 Mr K retired, aged 60, with the issue of pay for his additional duties unresolved.

33. It appears (though we do not have the document) that Mr K put in further representations on 22nd April 2009, seeking some form of "additional responsibility allowance". It is not clear whether Mr K was seeking specifically the "Responsibility Allowance" for which the current paragraph 52 of the Staff Rules provides. Under this rule a staff member who is required "to undertake duties and responsibilities conspicuously greater than the staff member's own grade for a continuous period of not less than 3 weeks, he or she is eligible for a higher responsibility allowance". The Rule goes on to describe the procedure for approval of such an allowance and specifies the mode of computation of such an allowance. Subsequent correspondence suggests that he might have been claiming a different "additional

responsibility” allowance, possibly by reference to local conditions. Whether or not Mr K was invoking Rule 52 or some other basis of claim, he was undoubtedly asking to be paid for the work he had done.

34. Mr M continued to press for a resolution of the matter. On 18th May 2009 he wrote to Dr S (copy to Ms B, HR officer) in the following strong terms:

“This has a reference to Mr H K’s representation dated 22.04.09 regarding additional responsibility allowance. I have had the matter examined in the light of the tasks performed by him and the provisions of the TACOS handbook for local staff. Below is a brief recital of the case and my conclusion and recommendation for further consideration by you and HR.

Up to 30.04.2002, Mr M P B was the Administrative Officer of the Centre while Mr H K functioned as the Executive Secretary to the Regional Director. On the latter’s opting for voluntary retirement, his responsibilities were reassigned w.e.f. 1st May among other staff i.e. H K, A G and R V with the major chunk being entrusted to HariH. As you are aware, prior to the introduction of the new TACOS for CYP local staff, the employees at this Centre were being governed by the pay and allowances as applicable to more or less similarly placed employees of the Govt. of Punjab. At the relevant point of time, the consolidated salaries and allowances of Mr Hi K were higher than those of Mr B - Rs 41,000+ for the former against Rs 35,000+ for the latter. It is pertinent to know that there was no grades attached to any of the positions, and the total salary package for any two identically placed employees depended to a large extent on the length of their service. It is difficult for me to say conclusively whether Mr H K or Mr B was in a higher post, although the latter enjoyed a higher pay packet.

As per clause 51 of the handbook on CYP Regional Centre Local Staff Rules and HR Policies,” where a staff member is required to undertake duties and responsibilities greater than those of the staff member’s own grade for a continuous period of not less than 3 weeks, he or she is eligible for responsibility allowance.” In the instant case, it is not possible to establish that Mr HariH KrishanK was called upon to undertake duties and responsibilities greater than those of his own grade, since (a) no grades were prevalent then and (b) he was drawing more salaries. Besides, we cannot apply the provisions of certain rules retrospectively.

... What must have come as a rude shock to him was that under the new TACOS he was placed in a grade that gave him a much lower salary than he was getting as Executive Secretary to RD, not to speak of the additional work load of the Administrative Office.

In my view, justice can and must be done to him only if his jobs and responsibilities are evaluated afresh after taking into consideration the facts stated above. This long delayed and long promised issue must be resolved immediately, not just for him but for a few others who were similarly aggrieved by the TACOS.

Hope, you would take appropriate action accordingly.”

[Bold type is in the original but the underlining is ours]

35. It appears that Mr K himself made further representations on 20th May 2009. The matter was further addressed in a memorandum from Mr M headed “Claim of Mr H K for responsibility allowance”. It has been dated in handwriting 22nd July 2009. It is not clear to whom this memorandum was addressed but it was apparently copied to HR. We set it out in full, so far as it relates to Mr K (There is a further section at the end which we do not reproduce dealing with other staff whose claims Mr M does not accept).

“The representation dated 20 May from Mr H K and the exchange of correspondences that followed may be referred to (Annex A-1). Director, YAD had requested me to examine the case. This has taken a while in view of the examination of old records and an attempt to find a rationale behind the decisions taken by the earlier Regional Directors. The precedent cases quoted by Mr H K have been stated in the note recorded by the officiating A.O. Mr. R V. It would be obvious that the amount of additional responsibility allowance, as distinguish from higher responsibility allowance provided for under the new TACOS for the local staff of CYP, sanctioned by the Regional Directors in these cases were neither based on any rule nor followed any uniform criteria in terms of percentage of pay, although the terms and conditions of service of the staff of CYP those days were largely in accordance with those of the Punjab Govt. employees.

An attempt was made to find out corresponding rules of the Govt. of India in such cases. These rules called Fundamental Rules (FRs) and Supplementary Rules (SRs) are often followed by most provincial governments who do not have their own service rules. An extract from the said rules may be seen at Annex G of Mr. VermaV's note. According to me, this is the most appropriate rule which ought to have been followed in Mr H K's (and other such cases) case when, as Executive Secretary to the RD he was entrusted with the bulk of the responsibilities discharged by the then Establishment officer, Mr M.P. B following his voluntary retirement from service. It may be noted that as Executive Secretary to RD, Mr H K was enjoying higher emoluments than Mr B. Thus, the logic behind the payment of higher responsibility allowance admissible under the TACOS (even if one is inclined to apply it retrospectively in this case) would not apply in this case.

Clause (iii) of F.R. 49 allows 10% of the presumptive pay of the additional post to an incumbent staff if s/he were to discharge the responsibilities attached to that post. Thus, Mr H K should ideally have been given 10% of Mr B's salary as additional responsibility allowance. However, the case becomes complex since he was given only a part, albeit major, of Mr B's charge while the rest were distributed amongst a number of other staff. I had, therefore, requested the officiating A.O. to determine in percentage terms the volume of additional work undertaken by all the staff previously with Mr BukhtiarB. His assessment based on the number of files being dealt with by Mr B which were handed over to Mr H K and others may be seen at page 1 of his note. Later, I considered it appropriate to get all the concerned staff (except Mr A who died in harness) to make a collective assessment which they have done. The result of that exercise and their recommendation may be seen in the supplementary note at Annex H.

I'm inclined to accept their assessment in terms of the volume of work, and based on that would like to recommend as under:

10% of the salary of Mr B be computed from the date of his voluntary retirement till the date of retirement of Mr HariH KrishanK and the same paid to the staff pro rata in terms of percentage of work-load rounded to the nearest zero"

[Underlining as in the original]

36. On 24th August 2009 Dr S wrote an e-mail to Mr K, promising to call Mr M the following day to " address the issue and compensate you for what you are rightly entitled to. Please rest assured that I will do my best".

37. On 1st September 2009 the following exchange occurred:

Mr K to Dr S:

"Respected Madam,

I am extremely thankful to you, Madam, for your response. I have full faith in your nobility and justice, who does what is hard to do, I hope that my dues will be settled soon as after rendering more than 33 years of committed and devoted service since and before the inception of the Asia Centre, I am still struggling to get fair justice. On the other hand, Mr. R V, AAO and Mr. K A, too juniors to me, are paid responsibility allowance instantly. Even arrears were paid to them. Their cases and my claim are just similar as per all facts and figures as Mr. R V is still covered under the old TACOS except Kamal.

Hoping to get justice on merit."

Dr S to Mr K:

"My dear friend H,

I hope you and your family are well.

I realize from the last correspondence that you have a point in seeking fairness and I will do my best to address this issue with Mr M if not today (I have meetings) then I will do it definitely tomorrow. I will inform you accordingly because you need to be treated fairly, I respected you and it is important that you do not have negative feelings about CYP because of the way you have been treated.

As usual I promise to do my best.

Please rest assured of my highest regards

FatihaF".

38. Dr S e-mailed Mr M on 2nd September 2009:

“... Following review of your summary and supporting documents and, to ensure fairness and a speedy resolution of the matter, my feedback is as follows:

1. I support your recommendation to compensate Mr H for additional responsibilities carried out during the stated period and according to the local legislation, namely 10% of the salary of Mr B to be paid to Mr H, in addition, I recommend that, as a gesture of good will (considering the time this has taken) towards a totally devoted CYP staff member whose upgrading to Grade 09 did not materialise, we consider an additional 10% of the total for the period during which he took on additional responsibilities. I hope you will consider this favourably so that we go ahead and resolve this matter.

2. All other requests for ‘payment’ due to additional tasks/responsibilities have to be viewed within the wider context of responsibilities versus specific tasks. The latter is normal practice in any organisation and one should not expect compensation. For the former (additional/higher responsibilities), I support the recommendation that this should be part of the job evaluations (pending) following which the matter would be reviewed and appropriate action taken. ...”

39. It appears that Dr. S had been proposing in the above e-mail to offer the Applicant 20% of the whole of Mr B’s salary.

40. When the figure to be offered to Mr K was finalised, however, the 20% was not applied to the whole of Mr B’s salary. Instead the 20% figure was applied to 40% of Mr B’s salary, on the footing that (on the Respondent’s case) Mr K had been discharging 40% of Mr B’s duties. So in principle, the Respondent was deciding to offer not the 20% of Mr B’s salary (as Dr S had envisaged) but 8% (being 20% of 40%). In fact, as Mr K pointed out and our own calculations confirm, the precise amount offered was 5.6% only of the 80 months of Mr B’s salary.

41. It is unclear whether this shift of approach, to which the Respondent had not drawn attention, arose from a difference of view or whether it was simply a mistake.

42. Whatever its genesis, the offer set out was as follows in a letter from Mr M dated 8th September 2009.

“Dear Mr. H K,

This is in reference to your application submitted to the undersigned for additional responsibility allowance for the duties in respect of Establishment Officer handled by you during the period 1st May 2002 to 31st Dec 2008.

This is to inform you that on the recommendation of the undersigned the Director of YAD has approved payment of 20% of Mr. M.P. B’s salary to you as additional responsibility allowance. Since you were assigned roughly 40% of the duties and responsibilities of Mr. B, the additional responsibility allowance has been computed based on 40% on the last pay drawn by him (for the period mentioned above). Accordingly, a payment of Rs. 1,56,899/- is due to you subject to payment of Income Tax as applicable.

With regards,

Yours sincerely,

(R K. M)

Regional Director”

43. The shift in thinking can be seen in the second paragraph of Mr M’s letter. He starts by referring to the approval of Dr S to Mr M’s recommendation that Mr K be paid “20% of Mr MP B’s salary”. But he then refers to the computation “based on 40% of the last pay” drawn by Mr B. To be specific

- (i) Mr B’s last salary was 35,022 Rupees a month;
- (ii) so 80 months’ of Mr B’s last salary would total 2,801,760 Rupees;
- (iii) 50% of the 80 months’ salary would total 1,400,880 Rupees
- (iv) 40% of the 80 months’ salary would total 1,120,704 Rupees
- (v) 20% of the 80 months’ salary would total 560,352 Rupees
- (vi) 8% of the 80 months’ salary would total 224,140.8 Rupees

(vii) the payment proffered by the Respondent of 156,899 Rupees is 5.6% of 2,801,760 Rupees

44. Mr K categorises Mr M's communication of 8th September 2009 as the first "contested decision" in the case.

45. He complained immediately to Mr M, copying his to Dr S, Ms O and Ms B of HR. in an e-mail dated 11th September 2009 as follows:

"This is in reference to your letter No. CYP/228 dated 8 September, 2009 wherein the Hon'ble Director, YAD had very kindly approved a payment of 20% of Mr. M.P. B's (E.O.) salary for duties and responsibilities the undersigned was discharging in the capacity of Admin Officer. I would like to make a request and draw your kind attention to following facts for reconsidering the amount of compensation.

1) E.O. was drawing a salary of Rs. 35,022/- p.m. when he opted for voluntary retirement. His work was then distributed among the existing staff and a major chunk of that was assigned to me. I had requested the then Regional Director and later on to your good self for consideration of extra remuneration for the duties of Admin. Officer. The Centre had saved a sum of Rs. 28,01,760/- for 80 months (without annual increases) by way of keeping the position of E.O. vacant and getting the work done through others.

2) The compensation which has been awarded to me is just 5.6% (1, 56,899 /28, 01,760) in lieu of nearly 50% of the work of A.O. performed by me. I am at loss to understand the rationale and accept the verdict as it is. It does not seem to be fair and justified.

3) I would also like to mention that the position of Finance and Admin. Officer in Africa Centre was awarded a grade of G9 and the local salary in Indian Rupees for the same grade is Rs. 1,12,484/- per month and the same for the period from 1.7.2005 to 31.12.2008 works out to Rs. 47,24,328/- (1,12,484 x 42 months). I strongly opinion [sic. opine] that since I was also performing dual charge (ES to RD/A.O.), I was eligible for grade G9 which despite your efforts and assurances from your predecessors including HRS remained unresolved. Even the revised job descriptions remained unevaluated for suitable wage placement. Hence, I had to take up the matter afresh after my retirement.

4) The compensation of Rs. 1,56,899/- in view of savings made by Centre and the tasks actually performed by me i.e. 50% is below my dignity. I am sorry to write this.

5) I would also like to draw to your kind attention that you had independently sanctioned a higher responsibility allowance equivalent to 75% of my last pay to present incumbent for the admin duties. Your contention that I was not performing duties of a higher position is not maintainable since I had always compared the position with G9, which for similar duties in place in Africa Centre. Moreover, the present incumbent (AAO/AO) was first allowed 100% of my salary and later you had yourself revised it to 60% and once again within a week's time it was enhanced to 75%. This was done without any scientific base, written representation or any agreed bench mark. Ideally, the higher responsibility allowance should have been linked to the salary of E.O. and not to that of E.S. to R.D. Whatever I was drawing was purely and solely in the capacity of ES to RD, the salary which I have gained based on years of service and also including my assured career progress increments (8, 16, 24, 32 years). Since both the ES to RD and AAO remained under old TACOS, the higher responsibility allowance should have been calculated on the basis of time spent for Admin Duties. Even, the internal time study of CYP Asia Centre and your letter dated 8 September, 2009 has confirmed that the additional quantum of work in respect of Admin duties was 40%. It raises a leading question that whether the 75% compensation to present incumbent is fair or not. The compensation of Rs. 1,56,899 for 80 months works out to Rs. 1,961/- per month whereas the compensation to present incumbent works out Rs. 18,349/- per month. Therefore, the compensation for the same volume of work varies in huge proportion from one person to another. I would also like add that the time study suggesting 40% compensation for me does not include some of the duties such as checking of dispatch records, receipt of incoming letters, checking of staff monthly salaries, handling projects like Bonding Beyond Boundaries etc. I am of the firm opinion that the duties in addition to my duties as ES to RD were not less than 50%. I was also not part of the consultative study and hence the possibility of it being 100% accurate may not be correct.

6) It is also submitted that applying Government of India and supplementary rules is recommending 10/20% in my case does not hold good as we were not following 100% government rules. The Centre has its own rule in regard to higher responsibility allowance, as the cases of present

incumbents (AAO and Programme Secretary) have been decided under these rules. How come the staff of the same organization has [sic. have] been treated by different set of rules?

7) I would also like to add that the qualification, experience and skills are in [sic. have] no match to that of the undersigned. This also remains a point while deciding the compensation and assigning higher responsibilities. I would also like to bring to your notice that the similar position as of mine is designated as OFFICER MANAGER (refer the grade for the same in CYP Caribbean Centre as I don't have the exact information).

I am, therefore, requesting your good self and also the higher authorities to reconsider the compensation. It should be fair enough to meet the ends of justice and the work performed by me vis-à-vis savings made by the Centre."

46. On 8th October Mr K e-mailed Ms O as follows:

"Respected Madam,

I worked in the CYP Asia Centre for a period of 33 years from 15 September, 1975-and retired on 31 December, 2008 as Admin. Officer/Exe. Secretary to Regional Director. My services were appreciated by all the Regional Directors with whom I had worked, the Director of Youth Affairs Division as well by as the current Commonwealth Secretary-General.

I would like to bring some facts to your notice for appropriate decision.

-While working as ES to RD, the work of Administrative Officer (who proceeded on voluntary retirement) was entrusted to me with effect from 1 May, 2002 and I duly discharged the additional/higher responsibilities until I retired on 31.12.2008.

- During the period from 1 May, 2002 to 31.12.2008 when I was discharging higher responsibilities I had made representations to the Regional Directors, HRS as well as Director YAD for grant of compensation for higher responsibilities. However, the same did not materialize until I retired.

-The fact remains that the grade of G9 as allowed to Administrative/Finance Officer in CYP Africa Centre did not materialize in my case even though the same was duly recognized by the Director - YAD vide her mail dated 9 September, 2009.

- Please note that I had made a number of written submissions to the Regional Directors, CYP Asia Centre for grant of reasonable higher responsibility allowance. My submissions were forwarded along with recommendations to the Director, YAD.

-The Director, YAD was kind enough to recommend 20% of 40% salary drawn by the then incumbent for whom I did additional work actually it is only 5.6% of his salary as compensation for higher responsibilities.

-However, while going through the records I noticed that the sanctioned compensation was inadequate and I had made request for review vide my e-mail dated 11.9.2009 (copy attached.)

- A reminder was also sent on 23.09.2009 for an earlier review and decision.

I am yet to hear from the RD or Director, YAD that prompted me to seek your intervention to this long outstanding request.

I would also like to highlight the following submissions:

1. I was discharging nearly 50% of the duties of E.O. when he handed over the charge to me until my retirement. The Centre saved a sum of RS 28,01,760/- for 80 months last pay drawn by the then E.O.

2. The so called 20% compensation granted to me for 80 months of RS 1,56,899 works out to merely 5.6% of the savings as described in 1 above.

3. I have been demanding the grade of G9 which was offered to Admin/Finance Officer in Africa Centre and was, therefore, eligible for higher responsibility allowance being the difference of G9 and my last pay drawn.

4. The work of Admin. Officer that I was performing until my retirement was subsequently handed over to Assistant Accounts Officer (AAO) and the Regional Director independently sanctioned the higher responsibility to AAO equivalent to 75% of my last pay minus his own pay.

5. I would like to emphasize that the pay I was drawing was purely and solely was in the capacity of ES to RD and I was not paid any compensation for administrative duties. The higher responsibility allowance granted to current incumbent i.e. AAO works out to Rs. 18,350.00 per month whereas the

compensation sanctioned to me works out to merely Rs. 1,961/- per month. Since I could not understand the basis of difference for the same quantum of work under the same rules and regulations. Hence, I was forced to request the authorities for a review and justified decision. This still remains the main cause of my representation and further referral to you.

6. The RD while decided [sic. deciding] the case of AAO himself, he referred my case to PCO that too by referring to Government of India regulations whereas the Centre is governed by its own set of TACOS for the local staff. It clearly shows violation of TACOS and also proves that two different set of rules have been applied for the same matter for two different staff members. Why so? I fail to understand. Ideally this should not have happened or at least HS should have been consulted in policy matters relating to HR.

7. Even an in-house study of the Centre has proved that I was not discharging less than 40% of admin. duties (though I have my reasons to submit that I was performing 50% of administrative duties and given an opportunity will justify the same).

I always believe that Commonwealth Secretariat advocated for its strong values and also promotes right to equality. However, I personally believe that by denying me justified higher responsibility allowance it has raised some serious concerns in my consciousness of being a member of Commonwealth family for about 33 years. My request to you is simply based on the facts and figures and would necessarily require your intervention for suitable decision within the framework.

I am hoping that you would be able to spare your valuable time to go through my representation for an [sic. a] justified decision. Should you need any further clarification, I will be ready to provide.”

[Underlining and bold type are as in the original].

47. Mr M also pursued the matter with Dr S. She wrote on 25 November 2009 that she would be seeing Mr M in early December and promised to settle the matter.

48. Dr S wrote again on 4th March 2010:

“Re. Payment of Higher Responsibility Allowance

Dear H

... On the above matter, I had really done my best to try and resolve the matter in the best possible way, taking into consideration the HR framework of the Commonwealth, its rules and procedures. I have also made an effort to propose to you compensation for the additional responsibilities you have fulfilled in difficult circumstances while HRS is trying to move forward with job evaluations including yours. I indicated that when the job evaluation is completed and your former post is upgraded, then the Commonwealth would pay retroactively the additional honorarium as an upgraded post. I am really sorry that you did not find this interim solution and can assure that I have indeed done my best.

My suggestion is that, if you would like to pursue the case, it might be useful to consider writing to the Deputy Secretary General who oversees all aspects of corporate services including human resources and finance. Please rest assured that I will continue to do my best so that you receive the compensation that you deserve for holding two positions and for your long service to the Commonwealth.

Best regards

F”.

[Our underlining]

49. Mr K took up the suggestion to progress the matter to the Deputy Secretary General. On 18 March 2012 he wrote to Ms M-M DSG recording his rejection of the offer, re-iterating and elaborating his complaints set out in his e-mail to Ms O. In addition to making the clear point that the offer corresponded to only 5.6% of the 80 months' salary, he refers to the lower grading of his job (at grade GO6) as compared to the job at the Africa centre (GO9). He further elaborates concerns to which he alluded in the earlier correspondence about the approval of an allowance for “the present AAO for the duties of “AO”. We understand this to be a reference to an additional allowance paid to a Mr V (we infer subsequent to Mr K's departure) for additional duties but we have found it very difficult to understand the significance of the points he makes. He does refer to discrimination. It is not clear to us whether he is simply contrasting the level of allowance given to Mr V (or the alacrity with which it was paid) with the failure to pay him anything or whether the payment to Mr V is intended to give rise to some free-standing

complaint. We suspect that, if we may say so, that the passages relating to Mr V's treatment may have distracted attention away from the simple and clear complaints

(a) that he had never been paid for additional work - work which was done on the basis that he would be compensated.

(b) that the offer now made reflected payment for only a very small percentage of the additional work undertaken.

50. On 19th April 2010 he referred his complaints also to the Director YAD and Head, HRS.

51. On 30th July 2010 (apparently after failing to secure a resolution at any other level) Mr K wrote to the Secretary General a letter headed "Petition for review and settlement of claim for higher responsibility allowance". In the course of that letter he summarised the position as follows:

"... I am compelled to bring to your kind notice with deep pain and grief, the injustice and discrimination of the CYP Asia Centre, Chandigarh, India against my legitimate claim. I failed to get any response from the Hon'ble DSG to my e-mail dated 18 March, 2010 - Annex. A, except one e-mail dated 15 April, 2010 from Mr. N.J, DSG's Office, to which I responded immediately, I seek your intervention to sort out this long pending issue.

Earlier my all representations to Director, CYP Asia Centre, Director YAD, Head, Human Resources, Hon'ble Deputy Secretary-General to get my justified claim settled failed. Hence this petition, it is a situation where I have exhausted all channels to get justified grievance redressed. I have never imagined that time would come when one feels helpless at the fag end of one's un-blotted career.

After 33 years of service in the CYP Asia Centre, I retired as Executive Secretary/Administrative Officer to RD. After having performed additional duties/higher responsibilities as Administrative officer, I have been struggling to get compensation from the Commonwealth Secretariat for the past several years even after my repeated written communication since my retirement on 31 December, 2008. All relevant papers, e-mail communications were earlier shared with Director-YAD, Head - HR and respected DSG.

The brief facts of my representation are as under:

1. I requested for granting of Grade 9 for dual responsibilities as Executive Secretary & Administrative Officer (Grade G 09 was granted to the Finance cum AO, CYP Africa Centre). Director, YAD was in agreement to my eligibility for grade G 09 (refer her e-mail dated 03 September, 2009 ...

2. Former RD-CYP Asia Centre- Mrs. R R several times recommended for the grant of Grade 9 for me as in Africa Centre

3. Based on my application, Director, YAD recommended compensation for higher responsibilities @ 5.6% (Rs. 1,961 per month) and her approval was conveyed to me vide RD's letter dated 8.9.2009, which I declined to accept as the Assistant Accounts Officer to whom I handed over the charge of Administrative Officer was paid @ 75% (Rs. 18,350/- per month) of my salary for the lesser volume of work that I was performing. A much higher compensation for lesser amount of work. While I am asked to accept Rs. 156,899 from 2nd May 2002 to 31st December 2008 ie 80 months, the present incumbent has already been paid Rs. 380,000 from 1st January 2009 to 30th June 2010 i.e. for 18 months. ...

4. Sine [sic. Since] the CYP did not fill in the Admin Officer's post thus saved more than Rs. 30,00,000 during the period in which I was asked to perform these duties for AO's position. I did perform with devotion, commitment and to the satisfaction of Regional Director. The higher responsibilities were entrusted to me on 2nd May, 2002 and I continued to perform till 31 December, 2008 (6 years and 7 months)

5. For these higher responsibilities I was not paid even a single penny for discharging higher responsibilities from 2 May, 2001 to 31 December, 2008. For the same responsibilities the present Assistant Officer of the Asia Centre was paid 75% of my last pay drawn. It is grossly wrong to compare the salary of Executive Secretary with Administrative Officer especially when there was separate grade for Establishment Officer.

6. Therefore, I failed to understand two officers (present one even lesser) performing same higher responsibilities are paid differently. It is a grave injustice and discrimination. In my case RD, CYP Asia Centre applied Govt. of India rule arbitrarily and while paying higher compensation to AAO, he applied-different rules disobeying the Commonwealth Secretariat rules. Even without any formal request from Assist. Accounts Officer and no reference to HR in PCO, the amount at higher rate was allowed and it is

being continued since 1st January 2009. The present incumbent doesn't even have the requisite qualification for Administrative Officer.

7. I failed to understand the logic and rationale to deal two similar cases with different yardsticks while I served the Commonwealth Secretariat for 33 years. My outstanding service was duly recognized by your good self. I respectfully appeal to Your Excellency to get contents of my legitimate claim examined and settle the same within established norms at the earliest. I am also requesting Your Excellency to get the arbitrary award of higher amount to present incumbent examined for your understanding on injustice and discrimination.

Despite expressions of empathy, positive assurances and an apparent good intention on the part of Director-YAD, this matter remains unresolved. I am therefore requesting that urgent consideration be given to and appropriate action taken on the settlement of the matter. I therefore call upon you to use your good offices role to ensure that the matter is addressed on priority.

Hard copy of this e-mail along with Annexures are being sent separately by air-mail registered post.

With esteemed regards”

52. It is right to comment that his complaint to the Secretary General increased the emphasis placed on what he clearly regarded as the more generous treatment accorded to the Assistant Accounts Officer (we presume Mr V) who had taken over certain duties after Mr K's departure.

53. The Secretary General passed the matter to ASG C for review. Mr C took technical advice and responded to Mr K on 9th February 2011 as follows:

“... I am, therefore, in a position to respond comprehensively to your appeal.

You may remember that, in her communication to you, the former Director, YAD, Dr F S had offered 10% compensation for carrying out the duties of Mr B, and another 10% as a gesture of good will to compensate for the time it had taken to resolve the issue.

The review of your appeal took into consideration all the documentation you submitted over the last few years and all the facts presented by HR and YAD. The Government of India's Fundamental Rules (FRs) and Supplementary Rules (SRs) were also taken into account in the absence of a provision for additional responsibility in the CYP (Asia) Handbook for Locally Recruited Staff.

The conclusion of the review is that the award offered to you in September 2009 by the Regional Director of the CYP Asia Centre, Mr R K Mishra, and the former Director, YAD, Dr F S was based on sound principles and interpretation of the rules applicable to this case.

Based on the evaluation of the facts in the advice I have received, I therefore uphold the decision previously taken that a total of 20% of the Salary of Mr B is applicable to you.

You have also separately expressed your concern about the grade and salary of your post while you were working with the Commonwealth Secretariat. I am advised that this matter was addressed by reverting your salary level to where it had been prior to the job evaluation in 2005. Accordingly, the new grade for your post that was introduced as a result of the job evaluation was not applied to you. In this respect, you were treated in the same way as all other staff whose posts were similarly affected. I am therefore assured that you were appropriately remunerated commensurate with your role. Accordingly, we do not intend to revisit this issue.

I am sorry that this has taken quite some time to resolve.”

[Our underlining]

54. So far as the offer made to Mr K was concerned, Mr C appears to have been under a misapprehension. The decision he states he is upholding is what he describes as a decision “that 20% of the salary of Mr B is applicable to you”. In fact, the starting point for the offer was that the additional work “applicable” to Mr K corresponded to 40% of Mr B's duties. Moreover, the offer made was not an offer of “20% of the salary Mr B” as Mr C's letter implies. It was an offer of 5.6% as Mr K had correctly pointed out.

55. Mr C' decision is the second contested decision in the case.

56. The third contested decision is a decision Mr K attributes to a much earlier date - 6th April 2009. This the decision to award what he describes as “75% of my last pay drawn”. Though he does not say so expressly, we take this to be a reference to the payment to Mr V. In identifying this further contested decision, Mr K makes a reference to Annex XI which has not really illuminated the position for us. At times

Mr K refers to the higher grade of an employee at the Progam's Africa centre but we are unsure what legal significance he asks us to attach to this.

The Application and Subsequent pleadings

57. On 30th April 2011 Mr K attempted to file this application but there was a technical hitch. On 12th May 2011 the Secretary to the Tribunal notified him that he had until 30th May to re-file. He duly re-filed his application by e-mail on 21st May 2011, within the time allowed by the Secretary.

58. As noted above, his claim to the Arbitral Tribunal seeks to impugn

(a) the decisions of 8th September 2009 and 9th February 2011 about the compensation to be paid for the additional duties he also seeks to contest

(b) the award (to which he assigns the date 6th April 2009) of the allowance to Mr R V.

We remain unsure whether the complaint about the payment to Mr V is simply directed to underlining what Mr K sees as the unfairness of not being recompensed appropriately himself or whether he is asking us to strike down a decision relating to the grant of benefits to another employee.

59. The Respondent contends that the claim is out of time. It accepts that the re-filed application would be in time (having regard to the extension granted by the Secretary) if Mr Cs' decision was the material decision. But it contends, in effect, that the real dispute crystallized at a much earlier date. The Respondent argues that it was not open to Mr K to revive what it contends was an "out-of-time" complaint by taking up the matter with the Secretary General and thus generating the further decision which came from Mr C.

60. The Respondent also raises jurisdictional objections. It contends that a claim based on an inadequate settlement offer is not a complaint of a category within the Tribunal's jurisdiction to consider: as the rejoinder puts it (in paragraph 8) "an offer of settlement is not part of the contract of employment of the Applicant, such as to found the jurisdiction of the Tribunal". It further contends that it is not within the jurisdiction of the Tribunal to entertain a complaint about the payment made to an officer (Mr V) other than the claimant.

61. As to the merits of the claim for payment for additional duties the Respondent says that there are only three avenues if an employee is to be compensated for acting beyond his or her grade

(a) Higher Responsibility Allowance - the Respondent says this is a discretionary allowance, intended for higher levels of responsibility and intended to be temporary; further, the Respondent says, such allowances were not intended to operate retrospectively

(b) Temporary promotion - the Respondent says there was no question of any "temporary promotion" arising

(c) Reclassification of posts - but this, the Respondent says, was a matter for the discretion of the Director who had no obligation to pursue this course; the Tribunal is not in a position to undertake such a re-classification.

62. The Respondent further contended that no legal basis of claim arose from the Applicant being asked to perform new tasks. In so far as there is an allegation of discrimination relating to Mr V it was not an allegation of discrimination on a prohibited ground. It submitted that the making of a settlement offer does not give rise to a justiciable complaint.

63. The Respondent further argued that in so far as Mr KrishanK complained of discrimination by comparison with the treatment afforded to Mr V the alleged discrimination (which it denied) did not take place on a legally prohibited ground.

64. In his Reply the Applicant contended that the Respondent has failed to see his claim in the right perspective. He had done roughly half Mr B's duties and had been promised due recompense but had not received it. The settlement offer was, in his contention, inadequate to meet his just entitlement. It was the failure to meet his entitlement (rather than the fact that the Respondent had offered him something) which lay at the root of the claim. He had pursued internal remedies appropriately before bringing the matter before the Tribunal and his claim was, he said, in time.

65. In the Rejoinder the Respondent took the opportunity to summarize helpfully the previous points it has made.

Analysis

Time limits

66. The relevant provisions are contained in Article II (2) or (3) of the Statute of the Arbitral Tribunal:
“2. Subject to paragraph 3 of this Article, the Tribunal shall only consider an application if:
(i) in relevant cases, the applicant has exhausted all other remedies available within the Secretariat including the redress of grievance procedures specified in Regulation 22 and in Rules 24(b), 138, 143, 155 and 214 of the Staff Rules and Regulations; and
(ii) the application is filed within a period of three months after the latest of the following:
(a) the occurrence of the event giving rise to the application;
(b) receipt of notice, after the applicant has exhausted all other remedies available within the Secretariat, that the relief asked for or recommended will not be granted; or
(c) receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have granted within one month after receipt of such notice.
3. The Tribunal may nevertheless consider an application which is out of time where it is satisfied that it was not reasonably practicable for the application to be filed before the end of the period of three months.”

67. In the present case it is accepted in the Rejoinder that the claim for compensation for additional work done (as considered by Mr C) is in time (with the extension already granted) if the decision of Mr C can be recognised as falling within section 2(ii)(a) or (b).

68. It seems to us that Mr C’ decision falls within 2(ii)(b) and that the claim is therefore in time.

69. Mr C’ decision was notice, after Mr K had exhausted other remedies within the Secretariat, that the relief he sought would not be granted.

70. We can understand the Respondent’s argument that it should not be open to an applicant who has waited until after the time limit has expired to engender a fresh dispute by re-opening correspondence which had been closed or raising an issue, out of the blue, with a more senior person than had previously handled the matter. This is not such a case. Mr K had been repeatedly promised that the matter would be resolved internally. When an offer was finally forthcoming and he rejected it, he properly sought to resolve the matter internally. He was in due course advised by one of his superiors to pursue, and did pursue the matter with DSG M-M . In the absence of resolution, he then took the matter up with Secretary General who referred the matter to Mr C. This was not a case of an employee seeking to revive a closed matter but of an applicant anxiously seeking to progress his claim through the proper internal channels before coming to the Tribunal. In these circumstances we think that Mr C’ decision of February 2011 is properly to be regarded as “notice” to Mr K that the relief he sought would not be granted. The claim is therefore in time so far as it relates to Mr C’s decision.

71. In a case where an applicant was seeking to revive a closed matter through fresh correspondence it might be necessary (though we are not finally deciding the point) to read sub-paragraph (2)(ii) (a) and (b) of Article II limitatively, so as to prevent abuse of process. There was certainly no abuse of process by Mr K here.

72. As regards the earlier decision of Mr M we are satisfied that it was not reasonably practicable for the application to be filed within three months of that decision for the very reason that Mr K was (with the encouragement of superiors within the organisation) pursuing internal remedies. We consider that it would be appropriate for the Arbitral Tribunal to consider this decision also.

73. In so far as Mr K also seeks to impugn a decision (which he says was taken in April 2009) to pay particular benefits to Mr V, we have decided that such a complaint is not within our jurisdiction in any event, so we do not propose to address time limit questions in relation to that decision.

Jurisdiction

74. The jurisdiction of the Tribunal is circumscribed by Article II:
“Article II

The Tribunal shall hear and pass judgment upon any application brought by:

- (a) a member of staff of the Commonwealth Secretariat;
- (b) The Commonwealth Secretariat;
- (c) any person who enters into a contract in writing with the Commonwealth Secretariat

which alleges the non-observance of the contract and includes, in relation to contracts of service the non-observance of the contract of employment or terms of appointment of such member of staff, and in relation to contracts for services the non-observance of the terms of the contract.”

75. It seems to us that so far as the dispute relates to non-payment for additional work done, the Applicant is alleging “non-observance of the contract of employment”. It may be that, on analysis, he is alleging that both his duties and his entitlements under the contract were varied by the arrangements which came into play on Mr B’s retirement (we address this below) but his claim remains a claim for non-observance of his contract. We determine below what the requirements of his contract were.

76. It would not be right to characterise his complaint (as the Respondent invites us to do) as being about the settlement offer, except in the formal sense that the making of this offer crystallised the Respondent’s alleged failure to pay what the Applicant contends to be the appropriate sum. Until that point, senior officers were telling Mr K that the matter would be sorted out and that he would be suitably compensated. In other words the decision to restrict the compensation to the amount offered crystallized the dispute, but the dispute itself was about his entitlement under contract of employment. His complaint is not about the making of the offer but about the refusal to pay him what he claims is due.

77. The position is different in relation to the complaint about payment to Mr V. Article II above only confers jurisdiction on the Tribunal to entertain allegations of non-observance of a contract of employment of “such member of staff”, that is to say, the individual who brings the application. It does not entitle the person who brings the application, Mr K to complain about payments to another employee, Mr V (if indeed he seeks to do so). If Mr K were contending that there had been discrimination against him on any legally prohibited ground (such as race or gender) then the matter would stand on another footing because the payment to the comparator could give rise to an entitlement under the Applicant’s own contract. But that is not this case.

78. We suspect that the complaint relating to Mr V was in any event intended mainly to add further colour to Mr K’s complaint about non-payment for work he has done. We can understand that since he was not paid promptly and he has not been offered compensation at what he regards as a suitable level, any generosity (if such it was) shown to another employee will have rubbed “salt in the wound”.

79. With respect, however, we have very limited information about payments made to Mr V and the reasons for and circumstances of such payments and we are not in a position to pass useful comment on his treatment relative to Mr K’s.

Merits of the complaint of non-payment for work done

80. It seems to us that the position is simple. From May 2002 Mr K was asked to assume and did assume additional duties, comprising some 50% of the work formerly done by Mr B (as we have concluded in our findings of fact). It was important work involving significant burdens, as the correspondence we have set out shows. We infer that it was always understood that he would be compensated for undertaking these additional duties. Successive Directors (Ms R and Mr M) proceeded on this basis as did the Regional Director Dr S. There was no suggestion that he should be doing the extra work for nothing. The possibility of compensating him through re-grading was raised but not pursued; and the matter was unresolved at his retirement in December 2008. But as confirmed by Mr M’s commendably vigorous pleas for action following Mr K’s retirement and Dr S’s supportive interventions, there was no suggestion that his retirement had relieved the Respondent’s obligation to pay him for doing the extra duties for 80 months.

81. We conclude that Mr K’s contract was varied so that he was required to perform the additional duties for reasonable additional remuneration. In the absence of any other agreements about the matter it seems to us that reasonable remuneration for 50% of Mr B’s duties for 80 months equates to 50% of Mr B’s salary for 80 months.

82. Of course matters would have stood on a different footing if the Respondent had regraded Mr K in the light of his total responsibilities and paid at a higher rate to reflect the additional responsibilities or agreed with him that some special allowance should be paid to him to reflect his “second job”.

83. The Respondent not having taken any such course, we are left to value the work taken over by Mr K. and we can see no more accurate measure than the relevant proportion (as we have found it, 50%) of Mr B’s salary. This does not leave the Respondent with any “savings” on that part of Mr B’s job taken over

by Mr K. It is not, however, the savings to the Respondent which are relevant here but the value of the work done.

84. The Respondent is correct that a Responsibility Allowance was never authorised. We accept that under Rule 52 such a payment requires approval of the “Head of PSDD on the recommendation of the Divisional Director” and that it would be for the Director, after satisfying himself of various matters specified in the rule to fix the amount of the allowance by a percentage “determined by the percentage of duties of the higher grade being undertaken”. (Whether Mr B’s work would have qualified as higher grade for this purpose is, as we have indicated, unclear at the very least).

85. Similarly we accept that there was no “temporary promotion” under Rule 54.

86. Further we accept that the Respondent was not obliged to re-grade the Applicant. The grading of employees has to be undertaken in a structured manner by the Respondent and its Directors and it is a matter for their discretion as to when and whether regrading exercises should occur. On the information provided we would be unable to say whether the responsibilities and local circumstances applicable to those doing jobs with similar titles at different Youth Program Centres around the Commonwealth are such that the Applicant should or should not be graded equally with someone doing a comparable job at, say, the Africa Centre.

87. But the fact that none of these routes were pursued in the Applicant’s case (whether or not they were all open) and that no express agreement was reached as to how much he would be paid simply means that the matter has to be determined after the event by valuing the services he has provided.

88. Despite admitting its responsibility to compensate him the Respondent did not pay him before the termination of his employment or even offer any sum until long after his retirement. The failure to pay was a breach of duty for which compensation should be awarded.

89. The sum it did then offer by way of settlement was grossly inadequate. At no stage was any proper or reasoned justification given for offering less than the full amount of the salary applicable to the duties of Mr B which Mr K had taken over. Further a reduction from what was originally intended to be a payment of 20% of Mr B’s salary (when approved by Dr S on 2nd September 2009)) to what amounted to an offer of some 5.6% (by Mr M a week later) was wholly unexplained and has not been explained in the pleadings. We suspect that it may even have arisen through an internal misunderstanding. We are unsure that Mr C has ever realised that the offer he was approving in February 2011 was an offer of only 5.6 % (not 20%) of Mr B’s salary.

Rescission of decisions

90. We rescind the first and second decisions challenged, that is to say the decisions of Mr M in September 2009 and of Mr C in February 2011 not to make full payment to Mr K for the additional duties performed.

91. We do not rescind any decision relating to payments made to Mr V.

Compensation

92. The amount of compensation to be awarded for the breach of duty we have found to be established is obvious and straightforward. We order that the Respondent pay the Applicant the sum it ought to have paid him being the value of the additional work done. This equates to 50% of Mr B’s salary for 80 months. The sum we award in accordance with the above computations is 1,400,800 Rupees.

93. Article X paragraph 1 of the Statute of the Commonwealth Secretariat Arbitral Tribunal provides (by way of general rule) that compensation shall not exceed three years’ net pay of the applicant. It goes on to provide further that the Tribunal may “in exceptional cases, when it considers it justified, order the payment of a higher amount of compensation”. In such an “exceptional” case a statement of the “specific reason” is required.

94. We are not entirely certain whether the salary figure (some 41,000 rupees per month) we have been provided for Mr K represents “net” or “gross” pay. If the sum we award does exceed three years’ net pay, we conclude that this is an “exceptional” case which justifies full payment of the amount due. The specific reasons are these. This is a case where the money we award has been earned; it is not merely an estimation of loss which may or may not accrue. Moreover, the circumstances are extraordinary: a devoted employee who did a second job over several years on the understanding of proper payment which never materialised.

95. More difficult is the question whether we should award interest. It was not specifically claimed although the Applicant does not limit the relief he seeks but claims any relief the Tribunal may consider appropriate.

96. We consider that whilst the Statute makes no express provision on the matter the Tribunal has power to award interest on the basis that by doing so it is putting the Applicant in the overall position he or she would have enjoyed but for the breach of duty.

97. Mr Rajah would have awarded such interest here “ex aequo et bono” on the basis that the Applicant has been kept out of his money by the Respondent’s delay in payment.

98. The President and Justice Ukeje consider that, particularly in a case where there is scope for debate about appropriate rates of interest, as to whether British or Indian or some other rates should be taken, as to the dates from which interest should run at particular rates, the Tribunal ought not to award interest without the subject having been specifically raised and the rates and technicalities being properly debated in the pleadings.

99. By a majority the Tribunal makes no award of interest.

Costs

100. The Tribunal has decided that there should be no order for costs.

Given on this 30th day of May 2012

Signed

Christopher Jeans QC, President

Justice R N Ukeje OFR, Member

Mr Chelva R Rajah SC, Member